6.

SUPREME COURT OF THE UNITED STATES.

No. 411.

ASAHEL AYLESWORTH, PLAINTIFF IN ERROR,

vs.

RENESSELAER S. PARKER, JOHN W. J. CULTON, AND HAROLD SPRAGUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the Circuit Court of the United States in and for the seventh judicial circuit and district of Indiana, begun and holden at the court house, in the city of Indianapolis, in said district, on the fifth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, before the honorable David McDonald, judge of the District Court of the United States, in and for the said district of Indiana.

RENSSELAER S. PARKER, JOHN W. J. CULTON, Harold Sprague
v.
ASAHEL AYLESWORTH. } Assumpsit.—No. 821.

Be it remembered, that heretofore to wit, on the 14th day of December, A. D. 1865, said plaintiffs, by Mess. Porter, Harrison, & Fishback, their attorneys, filed in the office of the clerk of
2 said court their declaration, in the words and figures following, to wit:

In the Circuit Court of the United States for the district of Indiana.

INDIANA, *sct:*

Renslow S. Parker, John W. J. Coulton, and Herald Sprague, who are citizens of the State of Illinois, complain of Asahel Aylesworth, who is a citizen of the State of Indiana, in a plea of trespass on the case upon promise, for that whereas the defendant, on the 11th day of December, 1865, at the district aforesaid, was indebted to the plaintiffs in the sum of five thousand dollars for the price and value of goods and merchandise then and there bargained and sold by the plaintiffs to the defendant at his request, and in the sum of five thousand dollars for the price and value of goods and merchandise sold and delivered by the plaintiffs to the defendant at his request; and in the sum of five thousand dollars for work then and there done, and materials for the same provided by the plaintiffs for the
3 defendant at his request; and in the sum of five thousand dollars for money then and there lent by the plaintiffs to the defendant at his request; and in the sum of five thousand dollars for money then and there paid by the plaintiffs for the use of the defendant at his request; and in the sum of five thousand dollars for money then and there received by the defendant for the use of the plaintiffs; and in the sum of five thousand dollars for money found to be due from the defendant to the plaintiffs on an account then and there stated between them. And the defendant, afterwards, on the day and year last aforesaid, in consideration of the premises, respectively promised the plaintiffs to pay them the several sums of money hereinbeforementioned on request; yet the defendant has not paid any of said sums of money or any part thereof, but so to do has hitherto neglected and refused, and still neglects and refuses, to the damage of the plaintiffs of five thousand dollars, and therefore they bring suit, &c.

PORTER, HARRISON & FISHBACK,
Att'ys for Pl'ffs.

And at the same time filed therewith the following bill of particulars:

4 A. Aylsworth, in ac. current with Parker, Culton, & Sprague:

1864.				
Nov.	19. To m'd'se transfer from G. H. Aylesworth, 19,167½ wool	10,017	69	563 78
Dec.	23. To m'd'se, 400 B. P. M. pork	14,700	00	694 14
	To comm., 400 B. P. M. pork	183	75	8 57
Feb.	1. To drayage, 150 B. pork	15	00	54
	15. To storrage on 100 bales wool	52	00	1 69
	To insurance on 100 bales wool	132	00	4 29
	To do on wool to Boston	75	00	2 43
	To drayage on wool, depot	15	00	46
	To expenses, stamps	2	10	
	24. To cash, telegram		75	
March	10. To do do		75	
Jan.	8. To expense, rebinning, 150 B. pork	75	00	
	14. To (Aug. 22, '64,) m'ds 124 wool unchanged	130	20	12
	14. To comm., 19,167 wool	254	07	
	14. To balance just to debit	796	18	
		$26,449	49	$1,276 20
June	14. To balance			$3,7762 02

Credit

1863.				
Jan.	3. By m'dse, 100 B. P. M. pork	3,765	00	162 30
	5. By do. 150 B. P. M. pork	5,512	50	240 36
	12. By cash, per express	1,500	00	62 50
	Feb. 25. By cash, pr. express	500	00	14 86
5	June 14. By (May 18) m'dse sales wool in Boston	8,827	04	
	June 14. By m'dse, 150 B. P. M. pork	2,672	93	
	Balance just			796 18
	Ballance	3,762	02	
		$26,449	49	$1,276 20

E. O. E.

Chicago, June 14, '65.

PARKER, COLTON & SPRAGUE.

And afterwards, to wit, at the May term of said court, to wit, on the 1st day of May, A. D. 1866, before the honorable, the judge aforesaid, the following further proceedings were had:

On motion, it is ordered by the court that all depositions on file in this court, in the above entitled cause, be published.

And afterwards to wit, at the May term of said court, to wit: On the 2d day of May, A. D. I866, before the honorable David Davis, one of justices of the Supreme Court of the United States, assigned to said circuit, and the honorable Davin McDonald, judge as
6 aforesaid, the following further proceedihgs were had:

Come now the plaintiffs, by Porter, Harrison, & Fishbach, their attorneys, and upon their motion the defendants are ruled to plead on or before the sixth day of the present term; and afterward to wit, at the May term of said court, to wit, on the 9th day of May, A. D. 1866, before the honorable David Davis, one os the justices of the Supreme Court of the United States, assigned to said circuit, and the honorable David McDonald, judge as aforesaid, the following further proceedings were had:

Comes now the defendant, by James Buchanan, esq., his attorney, and now files his pleas to the action herein, in the words and figures following, to wit:

The said defendant, by McDonald, Roach, and Sheeks, and James Buchanan, his attorneys, comes and defends the wrong and injury, when, &c., and says he did not undertake or promise in the manner and form as the said plaintiffs hereabove thereof complained against him, and of this he puts himself upon the county, &c.

And for further plea in this behalf, the said defendant says
7 actio now, because he says that said plaintiffs were and are indebted to the said defendant, in the sum of $20,000 for so much money by the plaintiffs, at their special instance and request, had and received, to the use of the said Ransoelar S. Parker, John W. J. Colton, and Harold Sprague, of this said defendant; and in the further sum of $20,000 for so much money by the said defendant, Asahel Aylesworth, laid out and expended to and for the use of the said plaintiffs, at their special instance and request; and in the further sum of $20,000 lent and accommodated to the said plaintiffs, at their special instance and request; and in the further sum of $20,000 for money found to be due and owing from the said plaintiffs to the said defendant on an account stated between him and them; all which sums were due and owing from the said plaintiffs to the said defendant at and long before the commencement of this action, and are still due and wholy unpaid; and the defendant hereby offers to set off so much of said sums of money so due and owing to him, as aforesaid, against the demands in the declaration set up as will
8 be sufficient to satisfy such demands as may be found due the said plaintiffs, and he pray judgment for the residue of said several sums of money so due as aforesaid to this defendant, to wit: For the sum of $20,000, according to the statute in such case made

and provided, and this the defendant is ready to verify, wherefore he prays judgment, &c.

McDONALD, ROACH & SHEEKS,
And JAMES BUCHANAN,
Att'ys for Defendant.

And at the same time files therewith the following bill of particulars, to wit—

Messrs. Parker, Colton & Sprague, Dr. in acc't with Asahel Aylesworth.

1864.	Aug. 22d,	to cash	$6,000 00
	Nov. 2d,	" "	5,000 00
1865.		" exchange and express	20 00
	Jan. 12th,	to cash	1,500 00
	Feb. 25th,	" "	500 00
		" ex. and express	10 00
		Balance due of principal	$13,030 00

And the said plaintiffs, by counsel, come also, and by argument, this cause is set for hearing on the 1st Wednesday of June next.

9 And afterwards, to wit, at the May term of said court, to wit, on the 12th day of May, A. D. 1866, before the honorable, the judges aforesaid, the following further proceedings were had:

Come now the parties, by their respective attorneys, and upon motion, the defendant has leave to take the depositions of witnesses during the present term, upon giving notice to the attorneys of the plaintiffs; and he also has leave, on further motion, to cross-examine the witnesses examined by the plaintiffs, whose deposition have been heretofore filed in this cause.

And afterwards, to wit, at the May term of said court, as aforesaid, to wit, on the 13th day of June, A. D. 1866, before the honorable judges aforesaid, the following further proceedings were had.

Come now the parties, by counsel, and the plaintiff now files his motion in writing to surpress certain parts of the depositions taken and filed in this cause by the defendants; and at the same time the defendant now files his like motion to suppress certain parts of the depositions taken and filed in this cause by the plaintiffs, and

10 the court takes such motion under advisement.

And afterwards, to wit, at the May term of said court as aforesaid, to wit, on the 14th day of June, A. D. 1866, before the honorable judges aforesaid the following further proceeding were had:

Come now the parties, by their respective attorneys, and the defendant files a notice with acknowledgment of service endorsed thereon, verified by affidavit to the plaintiffs, to produce upon the trial of this cause certain books and papers described in said notice, and thereupon moves the court for an order requiring the production of the same. It is thereupon ordered that upon the trial of this cause

the plaintiffs to produce their sales book, cash book, journal, day book, and ledger; also all letters received from the defendant, and from G. H. Aylesworth, relative to said wool and pork; also all letters written by Hallowell, and Hallowell & Coburn, of Boston, relative to the date and shipment of 100 bales of wool by the said plaintiffs
11 from Chicago to said Hallowell & Coburn, upon which the plaintiffs claims to charge the defendant; also the original bill of purchase of said 100 bales of wool; also the original account of sales and account current rendered by said Hallowell & Coburn on the sale of said wool; also the insurance certificates or policies for insurance the plaintiffs claims to have effected upon said wool; also original bills or receipts for drayage and storage charged by the plaintiff upon said wool, and the 400 barrels, and the 150 barrels of P. Mo. pork, upon which they claim a balance in their declaration in this case; also the original bills of purchase for the 400 barrels of pork, and all the telegrams sent by the plaintiffs to, and received from, the defendant, and G. H. Aylesworth & C. W. Aylesworth, of Fulton City, State of Illinois, relative to the wool and pork or controversy, and all receipts and bills and books and papers upon which the plaintiffs have paid out moneys, for which they seek to charge the defendant in their said declaration; and this order is made subject to all just exception upon the part of said plaintiff;
12 and thereupon, by agreement of parties, this case is continued until the next case of the court, at the cost of the plaintiffs, and leave is given to both parties, upon the giving of reasonable notice, to retake the deposition of Richard Hollowell.

And afterwards, at the November term of the court aforesaid, to wit, on the 8th day of November, A. D. 1866, before the honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Comes now the defendant, by his attorney, and moves the court to suppress the deposition of Richard P. Hallowell, filed in behalf of the plaintiffs.

And afterwards, at the November term of the court aforesaid, to wit, on the 10th day of November, A. D., 1866, before the honorable David McDonald, judge as aforesaid, the following further proceedings were had to wit:

Come now the parties, by their respective attorneys, and the court being now sufficiently advised touching the motion to
13 surpress certain parts af the deposition of Aylesworth, do surpress the said third, fourth, and fifth interrogatory, and do over rule the motion to surpress the said seventh interrogatory; and as to the residue of said motion the court retains the same for further advisement; and the plaintiffs now file their replication to the second plea of the defendant, as follows:

And the said plaintiffs, as to the said plea of said defendant by him secondly above pleaded, say that the said plaintiffs, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof

against the said defendant, because they say that they, the said plaintiffs, were not now indebted to the said defendant in manner and form as the said defendant hath above in his said second plea in their behalf alleged, and this the said plaintiffs pray may be inquired of by the country.

PORTER, HARRISON & FISHBACK,
Att'y Pl'ffs.

14 And this cause coming on to be tried, here comes jury, to wit, James A. Hill, Jesse L. Williams, Gideon Floyd, James B. Clark, Richard Newcomb, James T. Dunn, Fielding N. Mill, Josiah Forth, John Spirz, Nathan Gasaway, George Barney, and Jeff. Colescott, who, being duly sworn, are allowed to separate until Monday next at half past one o'clock, p. m.

And afterwards, at the November term of the court aforesaid, to wit, on the 12th day of November, A. D. 1866, before the honorable David McDonald, judge as aforesaid, the following further proceedings, to wit:

Come the parties, by their respective counsel, and the jury come also, and after hearing a part of the evidence, by leave of the court, they separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 13th day of November, A. D. 1866, before the honorable David McDonald, judge as aforesaid, the following further proceedings were had to wit:

15 Come now the parties, by their respective attorneys, and the jury comes also, and having heard further evidence, are permitted by the court to separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 14th day of November, A. D. 1866, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and the jury come also, and after hearing the residue of the evidence in this cause, are permitted by the court to separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 15th day of November, A. D. 1866, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and the jury come also, and having heard a portion of the argument of counsel, are by the court permitted to separate until to-morrow morning.

16 And afterwards, at the November term of the court aforesaid, to wit, on the 16th day of November, A. D. 1866, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and the jury come also, and after hearing the conclusion of the argument, and by consent of parties, permitted to separate until to-morow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 17th day of November, A. D. 1866, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and the jury come also, and having heard the charge of the court, upon their oath do say: We, the jury, find for the defendant, and assess his damages at the sum of ten thousand two hunded and sixty-six dollars and eighty-seven cents, ($10,266 87.)

17 And afterwards, at the November term of the court aforesaid, to wit, on the 19th day of November, A. D. 1866, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the plaintiffs and give notice of their intention to file a motion in writing for a new trial herein.

And afterwards, at the November term of the court aforesaid, to wit, on the 4th day of January, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and argument having been heard, and the court being sufficiently advised touching said plaintiffs motion for a new trial herein, the court do now grant the said motion, on the conditions that the said plaintiffs do pay the costs of the present term within ninety days from this date; and leave is granted to the defendant to amend his pleas at any time before the second day of the next term of this court.

18 And thereupon the said defendant, by his counsel, enters his motion that the court do reconsider the ruling this day above made in this cause; and it is ordered by the court that said motion be held over until the next term of this court, and the cause is continued.

And afterwards, at the May term of the court aforesaid, to wit, on the 15th day of June, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, and the court having been sufficiently advised touching the motion to reconsider the granting of a new trial herein, do deny said mention; and this cause is continued.

And afterwards, at the November term of the court aforesaid, to wit, on the 5th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Ordered by the court, that all depostions on file in this case be published.

19 And afterwards, at the November term of the court aforesaid, to wit, on the 6th day of November, A. D. 1867, before

the Honorable David McDonald, judge as aforesaid, the following proceedings were had, to wit:

Now come the plaintiffs, by Messrs. Porter, Harrison, and Fishback, their attorneys, and the defendant also comes by J. Buchanan, esq., and Messrs. Roach, McDonald, and Sheeks, the attorneys of said defendant; and thereupon the defendant, by council, moves the court for a rule upon the plaintiffs to produce for inspection on the trial of this cause their sales-book containing the entries of purchases and sales made by them in 1864 and 1865. their day-book, journal, ledger, and cash-book, for the same period; all the original bills of purchase for wool and pork, bought for the defendant and G. H. Aylesworth, for a balance due on which, as the plaintiffs allege the action is brought; their shipping-book for 1864 and 1865; all originals of bills and receipts, and receipted bills for storage of said wool
20 and pork, for drayage on same, for insurance on the same, whether in store, in transit, or otherwise, whereupon they assume to have paid money for the benefit of defendant, or of said George, on said articles; the original of all letters and telegrams received by you from G. H. Aylesworth and from defendant, in relation to said wool and pork; all letters and telegrams received by them from C. W. Aylesworth, of Fulton city, Illinois, in relation to said pork; all letters, bills, accounts current, and statements of any and all discriptions, in relation to said wool, received by them from R. P. Hallowell and Hallowell & Coburn, of Boston, Massachusetts, in relation to said wool; and said motion is taken under advisement.

And afterwards, at the November term of the court aforesaid, to wit, on the 6th day of November, A. D 1867, before the Honorable David McDonald, judge aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and this cause coming on to be tried, here comes a jury, to wit, Charles
21 Oswald, John S. Shirley, Edward L. Ganner, William H. Smith, Clark Willis, Rufus Spencer, John A. Colescott, Ruben Cooly, Winston P. Noble, A. S. Wills, O. H. P. Lindsey, and Reddick Wiley, who, being empanneled and sworn, hear a part of the evidence and are allowed to separate until the calling of the cause on to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 7th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and the jury herein come also, and having further heard the evidence in the cause, are permitted by the court to separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 8th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Now come the parties, by their attorneys, and the jury empan-

22 eled herein also come, and having further heard the evidence in the cause, are by the court permitted to separate until the calling of the cause on to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 9th day of November, A. D. 1867, before the Honorable David McDonald, as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their attorneys, and the jury empanelled herein comes also, and having further heard the evidence in the case, are by the court permitted to separate until 2 o'clock p. m. of Monday next.

And afterwards, at the November term of the court aforesaid, to wit, on the 11th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their respective attorneys, and the jury sworn herein come also, and having further heard the evi-
23 dence in the cause, are permitted by the court to separate until to-morrow at 2 o'clock p. m.

And afterward, at the November term of the court aforesaid, to wit, on the 12th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their attorneys, and the jury herein sworn also come, and having further heard the evidence in the cause, are permitted by the court to separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 13th day of November, A. D. 1867, before the Honorable David McDonald, judge aforesaid, the following further particulars were had, to wit:

Come now the parties, by their attorneys, and the jury empanelled in this cause also come, and having further heard the evidence herein, are permitted by the court to separate until to-morrow morning.

And afterwards, at the November term of the court afore-
24 said, to wit, on the 14th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their attorneys and the jury empannelled, and having further heard the evidence herein, are by the court permitted to separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 15th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

And now the parties, by their attorneys, and the jury also come, and having further heard the evidence herein, are permitted by the court to separate until to-morrow morning.

And afterwards, at the November term of the court aforesaid, to wit, on the 16th day of November, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

25 Come now the parties, by their respective attorneys, and the jury come also, and having received the charge of the court, now return into court the verdict following:

We, the jury, find for the plaintiffs and assess their damages at the sum of three thousand dollars. And the defendant now moves for a new trial, and his motion is overruled. It is therefore considered by the court that the plaintiffs do recover of the defendant said sum of three thousand ($3,000) dollars, together with the costs, taxed at $.

And afterwards, at the November term of the court, to wit, on the 7th day of January, A. D. 1867, before the Honorable David McDonald, judge as aforesaid, the following further proceedings were had, to wit:

Come now the parties, by their attorneys, and the defendant now files a bill of exception herein in the words and figures following, to wit:

26 Be it remembered, that upon the trial of said cause at this term of said court, the plaintiffs, to maintain the issues upon their part, offered evidence tending to show that the amounts they claimed in their bill of particulars were due them for the articles and items therein mentioned. Also, that all of the orders and instructions given in relation to the purchase they claimed to have made were in writing.

Also evidence tending to show that they were general commission merchants in the city of Chicago, Illinois, and that the defendant resided in Attica, Indiana.

Also evidence tending to show that they had purchased for the assignor of the defendant 100 sacks of a medium grade of Illinois fleece-washed wool, in merchantable condition. That it was purchased at Charleston, Illinois; that it was in sacks at the time it was purchased.

That Culton (one of the plaintiffs) examined from 15 to 22 bales of said 100, and decided upon such examination, and from the information derived from others, that all of the said wool had been

27 clipped from two flocks of sheep; that the entire 100 sacks was of medium grade, and in merchantable condition; and said Culton, as witness on plaintiff's behalf, was permitted to testify; that while making such examination Clement, of whom they claimed to have purchased, said that he (Culton) was very particular, and that the other bales of wool were just like these examined.

To the admission of which evidence the defendant objected, upon the ground that Clement's statements were not competent evidence. The court overruled the objection. The defendant excepted, which exception was allowed, and made part of the record of this cause.

The plaintiff Parker, as witness on plaintiffs behalf, was allowed to testify as follows:

Question. "Will you state what report, if any, Mr. Culton made to yourself and your other partner, Mr. Sprague, as to the result of his inquiries to fill the order of Mr. Aylsworth for wool?

"Answer. He said he had looked at some lots of wool, and
28 that there was one or two lots which he though would answer, but should look these over again thoroughly before deciding positively to conclude the bargain. He mentioned two lots, one at $1 07½, and one at $1 05."

To which question and answer defendant objected, on the ground that statements and conversations of the plaintiffs among themselves was not competent evidence in this case. The court overruled the objection, and defendant excepted, which exception was allowed and made part of the record in this cause.

Also plaintiffs gave evidence tending to show that said wool was purchased, weighed, and the weight of each sack marked upon same, together with its No. and as shipping mark thus [C], on the 22d day of August, 1864; and that the next day, August 23d, a settlement was made with said Clement for said wool, in the plaintiffs' office in the city of Chicago, and a bill of purchase taken, showing weights, amounts, &c.

29 Also evidence tending to show that said wool was shipped to Chicago, and stored until Feb. 15, 1865, when it was shipped to Boston, Mass., by direction of the defendant, and sold in the Boston market, by order of the plaintiffs, in April, 1865.

The plaintiffs also gave evidence tending to prove that, in the summer and fall of 1864, and during the war of the great rebellion, the Chicago market for medium wool was active and excited, in consequence of the demand of such wool for many purposes, and that consequently the grading of wool in the Chicago market was not so close, and the examination of it by buyers and commission merchants not so exact during that period as before and since.

To this evidence the defendant objected as impertinent and irrelevant. But the court overruled the objection, on the ground that usage prevailing at Chicago, at the time of the purchase of the wool in question, touching the purchase of medium wool, was com-
30 petent in evidence on the point, whether the plaintiffs exercised due care in purchasing said wool. And defendant excepted, which exception was allowed, and made part of the record in this cause.

The plaintiffs also gave evidence by experts, tending to show that the usage by commission merchants in Chicago during the excited market in 1864, and during the war of the great rebellion, was as matter of due care and diligence, to examine eight to ten, (as stated by some witnesses,) twelve to fifteen, (as stated by others,) and fifteen to twenty (as stated by others) bales of wool out of 100 bales, to determine the grades and condition of the entire lot of 100 bales, in filling orders of the kind given in this case; and that such examination would amount to reasonable care in filling such orders in Chi-

cago, in 1864, according to the usage of commission merchants in that city during that time.

To the admission of which evidence defendant objected, upon the ground that such evidence was incompetent in this case, and
31 in its character inadmissable, as establishing a custom of merchants, and was not pertinent to the issues joined. The court overruled the objection, and defendant excepted, which exception was allowed, and made part of the record in this cause.

The defendant gave evidence tending to show that the wool plaintiffs purchased and sold, for which they claim balances in this case, was not a medium grade of wool, in good merchantable condition; but was a mixture of all grades, and in inferior condition, and was not saleable, except at a discount from market price.

Also evidence tending to prove that a person of competent skill could, upon a proper examination, tell the grade and condition of any given quantity of wool.

Also evidence tending to prove that plaintiff Culton, who
32 claimed to have purchased said wool, was not an expert in the wool business.

Defendant also offered in evidence the order given plaintiffs to purchase wool, which order was by telegram, as follows:

"FROM ATTICA, IND., *Aug.* 19, 1864.

"To Parker, Culton & Sprague, Chicago, Ills.;

"Buy medium wool. Retain $6,000 as margins.

"G. H. AYLESWORTH."

Which telegram plaintiffs received on day of its date.

Also evidence tending to prove that, on the same day, the said G. H. Aylesworth wrote and posted to said plaintiffs the following letter:

"ATTICA, IND., *Aug.* 19, 1864.

"Messrs. Parker, Culton & Sprague, Chicago, Ills.: * * * * * * *

"I dispatched you to-day, to buy me medium grade of wool, and to retain $6,000 as margins.

"You will, of course, buy as much wool for the am't margin as possible. Judging from the price of that quality or grade of
33 wool, think you can afford to purchase some 30,000 lbs. on $6,000 margin, and should more margins be required, will put it up. Send bill of purchase. Buy as good and saleable an article as possible of that grade. * * * *

"Truly yours,

"G. H. AYLESWORTH."

Also gave evidence tending to show that by due course of mail said letter would reach plaintiffs at least by Aug. 21, 1864, but plaintiffs gave evidence tending to show that they received said letter on Aug. 22d, and that they took no steps to communicate its contents to Culton, who was then at Charleston, Illinois, where he had gone to

buy said wool for Aylesworth, and that said wool was purchased by him before noon of that day.

Defendant also offered evidence tending to prove that the wool merchants of the city of Chicago examined each fleece of wool in filling orders of the kind given in this case, and that such usage had never been varied, but this was not proved to be the usage of
34 general commission merchants in the city of Chicago, and was only the usage of buyers and sorters there.

In relation to which evidence, defendant prayed the court to charge the jury, that—

It must appear from the evidence, that the purchase the plaintiffs claim to have made, was in fact made substantially in accordance with the instructions given for that purpose, by defendant and G. H. Aylesworth.

Which charge the court refused as prayed, to which ruling defendant excepted, which exception was allowed and made part of the record in this cause.

But the court did charge the jury as follows:

Commission merchants to whom orders are given to purchase goods of a particular quality or description for their principals, if they undertake to fulfil such orders, are bound to do so in good faith, and with proper skill, care, and deligence, and if they omit so
35 to do, they are liable to their employers for the consequence of the want of such good faith, skill, care, and diligence, but they are not to be held responsible as insurers or gauarantors, and, if having exercised such good faith, skill, care, and diligence, a mistake as to the quality or condition of the goods so purchased for his principal, the commission merchant is not in such case responsible.

To which last named instruction, the defendant at the proper time excepted.

Defendant also prayed the court to charge the jury, that in regard to the wool, plaintiffs' claim to have purchased, it appears that an order by telegram was sent from Attica, Indiana, to the plaintiffs at Chicago, Illinois, (their place of business,) which telegram plaintiffs receieved on day of its date, and it reads as follows:

(Copied elsewhere in this record.) It also appears that on the s me day the telegram was sent. G. H. Aylesworth, mailed
36 to the plaintiffs a letter which repeated in substance the order contained in the telegram, but it does not appear with certainty on what day the letter was receieved by them, but as the legal effect of the letter and telegram are the same, so far as the instructions to buy wool are concerned, it is not important whether the letter was receieved before or after they claim to have executed the order contained in the telegram.

The legal construction of the telegram is, that the plaintiffs were to buy in the Chicago market as much wool of medium grade, in good merchantable condition, as the $6,000, they were authorized to retain as margins, would enable them to purchase; and then to hold such wool subject to the order of Aylesworth.

If the plaintiffs assumed to act upon this telegram, it was their

duty to fill the order given, and to that end they were bound to bring to the performance of that duty sufficient skill and diligence
37 to select the article ordered, and the purchase by them of wool of any other grade or condition would not bind Aylesworth, unless, with a full knowledge of the grade and condition of the article they had obtained, he should afterwards ratify and assent to what they had done.

Which charge the court substantially gave with this modification; that if the plaintiffs, in purchasing the wool, exercised due skill and care, they are not responsible, though the wool did not fill the order. To which ruling the defendant excepted, which exception was allowed, and made part of the record in this cause.

But the court did charge the jury that the telegram only required the plaintiffs to purchase a fair, saleable article of medium wool, while the letter ordered "as good and saleable an article as possible of that grade;" otherwise they are the same. But if the wool was bought at Charleston before the partner who made the
38 purchase could be informed of the contents of the letter, the letter would not bind plaintiffs, otherwise it would.

To the giving of which charge defendant objected, but the court overruled the objection, and defendant excepted, which exception was allowed and made part of the record in this cause.

Defendant also prayed the court to charge the jury that—

By the terms of the telegram plaintiffs were to purchase the wool in the Chicago market, but they were not precluded from making the purchase elsewhere and bringing the article to Chicago; and as it appears from the evidence that the wool the plaintiffs claims to have purchased for Aylesworth was, in fact, purchased at Charleston, Illinois, some 100 miles distant from Chicago, the plaintiffs in making the purchase at another place assumed all the risks of bringing it into Chicago; and that when brought there it should fill the
39 order of Aylesworth both as to grade and condition, and if it failed to do so, then Aylesworth was not bound by the purchase.

Which instruction the court gave, with the following modification, to wit:

Unless the plaintiffs, in making such purchase, exercised the utmost good faith, skill, care, and diligence, touching the proper grade and condition of the wool.

To the giving of said instruction, as modified by the court, the the defendant objected, and court overruled the objection, and defendant excepted, which exception was allowed and made part of the record in this cause.

Defendant offered evidence tending to show that all he and his assignor, G. H. Aylesworth, knew about the grade and condition of said wool, was what they learned from the correspondence of plaintiffs, until the later part of April, 1863, when defendant
40 learned by letter from Hallowell and Coburn, of Boston, Mass.,

that the 100 sacks of wool plaintiffs had shipped to them was a mixture of all grades and in inferior condition; upon the receipt of which information, defendant, without delay, notified plaintiffs of the non-acceptance of said 100 sacks, and demanded a return of the $11,000 that had been advanced as margins on wool.

The information they obtained from plaintiffs in relation to the quality and condition of said wool was as follows, per extract:

On Aug. 20th, 1864, plaintiffs wrote G. H. Aylesworth in answer to his telegram of Aug. 19, 1864:

"Your telegram of 19th at hand. We have bought for you a lot of wool and are going to look it all over, and if it meets with our approval (i. e. if it is all right,) shall take it and will let you know further. * * * * We consider this a tip-top bargain,—have no letter from you yet."

41 Also on Aug 22d, 1864, plaintiff wrote again, as follows:

"Your favor of the 19th at hand; contents have our attention * * * * Your account stands credited with (6000) dollars margins on wool. As soon as we get the bill will send it to you—shall purchase all the wool the money will buy on the margin's left * * * * Your orders shall have our best attention at all times."

Also again on Aug. 26, 1864:

"We had hoped to have been able to send you an invoice of your wool, but the trade then on hand when we last wrote, fell through and consequently we had to look up another lot; we have now completed it, and shall send you an invoice just as soon as it is weighed, which we think will be in a few days." Also, on Sept. 2d, 1864, plaintiffs wrote: "We enclose you account purchase of 100 bales wool, a choice lot; should have sent you the same before, but have some little difficulty to get the weights, and had some delay
42 in getting it at all; but the sale to us finally stuck. We know that this lot is all right."

In relation to which defendant prayed the court to charge the jury that the plaintiffs, as commission merchants, were acting in the capacity of factors or agents of Aylesworth who is their principal.

This relation of factor and principal imposes upon the factor primarily the obligation to strictly obey the orders and instructions of his principal.

The factor is also bound to act toward the principal with the utmost good faith, as well as to use due care and skill in the management of his principal's affairs, and if you find from the evidence that the plaintiffs informed Aylesworth that they had complied with his order, he had the right to rely upon their representations, and was not bound to examine the article for himself.

And if you further find from the evidence that the article
43 purchased and sold was not in fact what they were ordered to purchase, and that the defendant refused to accept the same as soon as he became aware of its defects, or had reason to believe that it was not of the grade and condition ordered, he had the right to so refuse, and claim from the plaintiffs the sums of money that had

been deposited as margins, with interest upon these sums from the respective dates of deposit.

Which charge the court gave, adding the following modification, to wit, that the jury must apply this charge to the wool transaction only, and not to the transaction concerning pork.

And the court also added the following instruction, to wit:

That the defendant had the right to rely upon the representations made to him by the plaintiff touching the wool.

And in relation to their having filled the order given, and
44 upon the receipt by the defendant of information that the wool was not in fact what the order called for, he would have the right to refuse to accept same, and claim from the plaintiffs the sums of money advanced as margins with interest thereon, unless you find that plaintiffs in making the purchase for Aylesworth, did so in the utmost good faith, and used such reasonable skill, care, and diligence, as was customary at that time among commission merchants in the Chicago market.

To the giving of which defendant objected, and the court overruled the objection and defendant excepted, which exception was allowed and made part of the record in this cause.

All of the evidence in relation to directions of defendant for the shipment of said wool is in correspondence, as follows:

On the 18th January, 1865, defendant wrote plaintiffs thus:

"Perhaps you are as much disappointed in the wool market
45 hitherto as I have been, yet I suppose your means for obtaining information in regard to the future prospective wool market is better than mine.

"I presume you have correspondents in New York and Boston, whose opinions are valuable as to the prospective prices of wool in those markets in February and March to June.

"As I do not wish to hold that lot of wool any longer than I have an opportunity to dispose of it at the best prospective price in the future, will you please give me the best information you have or can in reference to this subject; and whether it will be better to ship the wool to one of those places, than to sell in Chicago, and also what would be the probable freights, and charges, if shipped there per pound."

On January 20th, 1865, plaintiffs replied, as follows:

"Your valued favor of 18th inst. received to-day. In reply
46 will say * * * of late prices have been better in Boston, and we have arranged there with a strictly reliable house, for the sales of some lots sent there, and know of no better advice to give you, and should you so direct, we would hold it subject to our choice in time to sell, as we are fully posted of transactions sales (late) of Ills. and Iowa at 90 to $1 05 as per quality.

"The freight we have paid on2 lots, by Nottingham's Express, was $1 39 per 100 bs; the safest was to ship, and their tarriff was $1 55. We think could do same for you.

"The other expenses will depend on the time it is held there, and they would be probably no more than if held here. We hope you

may conclude to send it, as doubtless 1st sales must be from that market."

On Janu'ry 24, 1865, plnintiffs write again:

47 "We are still inclined to think the best thing you can do, is to have your wool shipped to Boston. Our correspondent quotes wool firm at $1 00 to $1 05, and in demand by manufacturers."

On receipt of plaintiff's letters of Janu'ry, 20 & 24, def't answered, January 30th, 1865:

"I think from contents of your letters, it will be best to ship my wool to Boston for a better market, and sell it when and as soon as you think the market will pay me best. All things considered, please ship it as soon as you can. Let me hear from you often.

***

P. S. I trust you will use the same diligencc and care, in securing the freight, insurance, &c., at as low a figure as you would, if the interest was all your own,"

To this, plaintiffs replied, Feb. 1, 1865, as follows:

"Yours at hand, and will ship the wool as soon as possible."

48 Plaintiffs also wrote again, on Feb. 13, 1865, as follows:

"The wool is shipped as directed ***. (We notice in Mr Culton's letter of the 20th of January, reads, freights to Boston is $1 39 per 100 bbs. It should read 3 39 per 100 lbs. The regular rate is $3 51 per 100 lbs.

"We have shipped yours at the rate mentioned $3 39."

Also plaintiffs gave in evidence a copy of bill of lading from Nottingham's Express Co., of which the following is an extract:

CHICAGO, ILL'S, *Feb.* 15, 1365.

Rec'd of Parker, Culten & Sprague, Chicago, Ills, 100 sacks wool, marked C, consigned to Hallowell & Coburn. Boston, Mass.

The evidence tended to prove also the following facts:

That the 100 sacks of wool were sold by Hollowell and Coburn, of Boston, Mass., on the 4th, 14th, 18th and 20th days of April, 1865.

Hallowell and Coburn corresponded with the plaintiffs in relation to said wool, and before the sale of any of the wool, at Boston; to recognize the defendant as having any right to control said wool, and recognized the plaintiffs only, as their principals. The Boston

49 house held the wool in the plaintiffs name and subject alone to their orders, and sold same on order of plaintiffs, and rendered all of their accounts of sale and accounts current, and interest account to the plaintiffs, which accounts were accepted by the plaintiffs, and from same, they made up the balances they claim as due them in this case; also that plaintiffs, on Feb. 15th. 1865, insured the wool in transit $20,000, and attached their draft to the insurance certificate and bill of lading for $10,000, and drew against said wool for that amount to Hallowell & Coburn; and upon same day, Feb. 15, 1865, cashed said draft at bank, in Chicago, without defendant's knowledge or consent. The plaintiffs having before that time advanced

been deposited as margins, with interest upon these sums from the respective dates of deposit.

Which charge the court gave, adding the following modification, to wit, that the jury must apply this charge to the wool transaction only, and not to the transaction concerning pork.

And the court also added the following instruction, to wit:

That the defendant had the right to rely upon the representations made to him by the plaintiff touching the wool.

And in relation to their having filled the order given, and
44 upon the receipt by the defendant of information that the wool was not in fact what the order called for, he would have the right to refuse to accept same, and claim from the plaintiffs the sums of money advanced as margins with interest thereon, unless you find that plaintiffs in making the purchase for Aylesworth, did so in the utmost good faith, and used such reasonable skill, care, and diligence, as was customary at that time among commission merchants in the Chicago market.

To the giving of which defendant objected, and the court overruled the objection and defendant excepted, which exception was allowed and made part of the record in this cause.

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Hallowell and Coburn corresponded with the plaintiffs in relation to said wool, and before the sale of any of the wool, at Boston; to recognize the defendant as having any right to control said wool, and recognized the plaintiffs only, as their principals. The Boston

49 house held the wool in the plaintiffs name and subject alone to their orders, and sold same on order of plaintiffs, and rendered all of their accounts of sale and accounts current, and interest account to the plaintiffs, which accounts were accepted by the plaintiffs, and from same, they made up the balances they claim as due them in this case; also that plaintiffs, on Feb. 15th. 1865, insured the wool in transit $20,000, and attached their draft to the insurance certificate and bill of lading for $10,000, and drew against said wool for that amount to Hallowell & Coburn; and upon same day, Feb. 15, 1865, cashed said draft at bank, in Chicago, without defendant's knowledge or consent. The plaintiffs having before that time advanced

for the defendant a large sum of money on the wool, which they have requested defendant to repay, which he hae failed to do; that plaintiffs knew, before said wool was shipped, that the commission of the Boston house were one cent a pound, and one per cent.
50 on sales when the Boston merchants made no advances; and that when advances were made the Boston merchants charged 5 p. cent. on sales.

Also that defendant had advanced to plaintiffs on account of said wool $11,000.

In relation to which the court charged the jury that, if you find that without fault of the plaintiffs the wool in transit to Boston got so mingled or confused with others sacks of wool, or got mixed in the Boston house with other wool, so that its identity was lost, these plaintiffs would not be responsible for the consequences, if the defendant assented to, or ordered the shipment to Boston.

To the giving of which charge defendant objected. The court overruled the objection, and defendant excepted, which exception was allowed and made part of the record in this cause.

The defendant gave evidence tending to show that on the
51 arrival of said wool in Boston, the plaintiffs were advised by their Boston correspondents that said 100 bales received by them was in very inferior condition.

Also evidence tending to show that plaintiffs never communicated said information to defendant.

In relation to which a juror asked the court the following question:

Were the plaintiffs bound to communicate to the defendant all the information they obtained concerning these transactions? To which the court replied, in charging jury—

The plaintiffs were bound to communicate to the defendant every fact which they deemed material to the defendant's interest.

The plaintiffs gave evidence tending to show that they had purchased and held for the defendant 150 bbls. prime mess pork; that same was purchased at $36 75 per bbl; that they received
52 from defendant $2,000 as margin upon same; that they sold same on June 14, 1865, at $19 00 per bbl.

The defendant gave evidence tending to show that on the 20th of April, 1865, he negotiated a sale of said pork to a responsible purchaser in Fulton City, Ill's, at $25 per bbl.; that said purchaser at Fulton City, Ill's, forwarded to plaintiffs the order of defendant to transfer said pork to his account, and notified them that he was ready to accept same and pay charges, &c., on the pork, but did not offer to pay to plaintiffs the price of the pork or the general balance due then on the account of this transaction with defendant.

Also evidence tending to show that defendant also informed plaintiffs of such sale, and ordered them to transfer same. Also evidence tending to show that upon the receipt by plaintiff of the order of transfer and notification of sale from the purchaser the plain-
53 tiffs made no reply to him, but, upon receipt of the letter from defendant in relation to said transfer, they replied to him by telegram, as follows:

"Can't transfer pork until your account is paid up."

In relation to which defendant prayed the court to charge the jury as follows:

In regard to the sale of the pork in controversy, if you find from the evidence that the plaintiffs did in fact purchase and hold for the defendant certain pork, as alleged, and you further find that the defendant made a contract of sale for such pork to C. W. Aylesworth, of Fulton City, Ill's, at $25 per bbl., and ordered the plaintiffs to execute the same, it was the duty of the plaintiffs, as the defendant's factors, to have complied with the order and executed the sale, and then taken off the proceeds of the sale and first applied them to the discharge of the balance, if any were due them on account of
54 such pork, and then applied the overplus, if any, to the discharge of the other indebtedness of the defendant to them, if any such there was.

But if you find that the plaintiffs refused to execute the order of sale, and continued to hold the pork, and it declined in price and was afterwards sold by the plaintiffs. on their own motion, at $19 per bbl., such decline must be alone at the risk of the plaintiffs, and they must account to the defendant for the pork at the price he ordered them to execute the sale at.

Which charge the court refused as prayed; to which ruling defendant excepted, which exception was allowed and made part of the record in this cause.

But the court charged the jury in relation to same as follows:

In regard to the pork transaction, if you believe from the evidence that the plaintiffs actually bought and held for the defendant certain pork, and that defendant sold said pork for $25 per barrel, and notified plaintiffs thereof, and ordered them to execute such sale, it was the duty of the plaintiffs to do so, and to have turned the same over to the new buyer, provided they had no liens thereon for their percentage and charges, or for general balances, in which latter case, they would not have been bound to obey such order until such percentage, charges, and general balances were first paid or tendered to them, either by the defendant or such new purchaser.

But if the plaintiffs, without such cause as aforesaid, wrongfully refused to turn over such pork to such new purchaser, and the market declined, or any loss on the pork followed on such wrongful refusal, the plaintiffs and not the defendant ought to suffer the loss.

To giving which charge defendant objected; the court overruled the objection, and defendant excepted, which exception was allowed and made part of the record of this cause.

55 And the defendant prays that this his bill of exceptions be signed and sealed by the judge and made a part of the record herein, which is done January 4th, 1868.

[SEAL.] DAVID McDONALD.

In the Circuit Court of the United States, district of Indiana.

I, John D. Howland, clerk of said Circuit Court, do hereby certify that the above and foregoing is a full, true, and complete copy and

transcript of the record and proceedings in the above-entitled cause, as fully as the same remain in said court.

Witness my hand and the seal of said court, this 18th day of January, A. D. 1868.

[SEAL.] J. D. HOWLAND, *Clerk.*

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judges of the Circuit Court of the United States for the seventh circuit and district of Indiania, Greeting:—

Because in the record and procedings, as also in the rendition of judgment in a plea; which is in the said Circuit Court before you, between Rensselaer S. Parker, John W. J. Cutton and Harold Sprague, defendants in error, and Asahel Aylesworth, plaintiff in error, a manifest error hath happened to the great damage of the said Asahel Aylesworth, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and
3? full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-
p ceedings aforesaid, with all things concerning the same, to the
57 Supreme Court of the United States, together with this writ, so that you have same at Washington, on the seventh day of December next, in the said Supreme Court, to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 13th day of January, A. D. 1868, and of the Independence of the United States the 92d.

JOHN D. HOWLAND, *Clerk.*

58 UNITED STATES OF AMERICA, *ss:*

To Rensselear S. Parker, John W. J. Cutlon, Harold Sprague, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the office of the clerk of the Circuit Court of the United States for the 7th circuit and district of Indiana, wherein Asahel Aylesworth is plaintiff and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable David McDonald, Judge of the District Court of the United States in the circuit and district aforesaid, this 13th day of January, A. D. 1868.

DAVID McDONALD,
Judge of the U. S. Dist. Court, district of Indiana.

59 We acknowledge service of this citation.

PORTER, HARRISON & FISHBACK, *For Plff's.*

In error from the U. S. Circuit Court for dist. of Indiana.

ASAHEL AYLESWORTH
vs.
RENSELO S. PARKER, *et al.*

Comes the plaintiff in error by McDonald & Roach, his attorneys and says that manifest error has intervened in the judgment aod proceedings in this cause, wherefore he prays that the same be reversed

McDONALD A ROACH,
Atty's for pl'ff in error.

In nulto est erratum.

PORTER, HARRISON & FISHBACK.
For def't in error.

From the Supreme Court in error to the Circuit Court of the U. S.

ASAHEL AYLESWORTH
vs.
RENSELO. S. PARKER, *et al.*

We enter our appearance in this case for the defendants in error, and agree that this record may be filed for the present term of the the court.

PORTER, HARRISON & FISHBACK,
For defl's in error.

REC. 411—3

SUPREME COURT OF THE U. S.

No. 251.

ASAHEL AYLSWORTH,

PLAINTIFF IN ERROR,

vs.

RENSLOW S. PARKER, Et. Al.,

DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

BRIEF OF JAMES BUCHANAN,

Attorney for Plaintiff in Error.

INDIANAPOLIS:
SENTINEL STEAM PRINTING AND BINDING ESTABLISHMENT.
1869.

SUPREME COURT OF THE U. S.

No. 251.

ASAHEL AYLSWORTH, PLAINTIFF IN ERROR,

vs.

RENSLOW S. PARER, *et. al.*, DEFENDANTS IN ERROR.

I.

STATEMENT OF THE CASE.

PLEADINGS.

Declaration by plaintiffs below in assumpsit, with common counts for $5,000.

Two pleas, by defendant below, first, general issue; second, set off, demand $20,000.

Issue joined by general replication to defendant's second plea.

II.

THE FACTS.

There are two branches to this case: the first is in relation to a wool transaction; the second concerning a sale of pork. For convenience, we will examine the questions in each separately, as they so stand in the record, in the order above named.

In relation to the wool, G. H. Aylsworth, of Attica, Ind., assignor, of Asahel Aylsworth, this plaintiff in error, ordered Parker, Culton & Sprague, general commission merchants of Chicago, Illinois, to purchase for him a "*medium grade* of wool, in good merchantable condition." His order was sent both by telegraph and letter, as per copies below.

(NOTE.—After the order was sent, a novation was worked whereby Asahel was substituted in the place of G. H. in the contract. The evidence of this is not in the record; as no question was raised in relation to same; but the record stands as though Asahel had been the contracting party from the beginning.)

Telegram—

"From ATTICA, IND., AUG. 19, 1864.

"To PARKER, CULTON & SPRAGUE, *Chicago, Ills.*:—Buy medium "wool, retain $6,000 as margins. G. H. AYLSWORTH."

Letter—

ATTICA, IND., AUG. 19, 1864.

"MESSRS. PARKER, CULTON & SPRAGUE, *Chicago, Ills.*:—I des- "patched you to-day, to buy me medium grade of wool, and to "retain $6,000 as margins.

"You will, of course, buy as much wool for the amount mar- "gin as possible. Judging from the price of that quality, or "grade of wool, think you can afford to purchase some 30,000 lbs. "on $6,000 margins, and should more margins be required, will "put it up. Send bill of purchase. Buy as good and saleable an "article as possible of that grade. * * * * *

"Yours truly, G. H. AYLSWORTH."

Parker, Culton & Sprague replied as follows:

"AUG. 20, 1864.

"Your telegram of 19th at hand. We have bought for you a "lot of wool, and are going to look it all over, and if it meets "with our approval, (i. e., if it is all right,) shall take it and "will let you know further. * * * We consider "this a tip-top bargain. Have no letter from you yet."

Also, further replied on Aug. 22d, 1864, as follows: "Your "favor of the 19th at hand; contents have our attention. Your "account stands credited with (6,000) dollars margins on wool. "As soon as we get the bill, will send it to you--shall purchase "all the wool the money will buy on the margins left. Your "orders shall have our best attention at all times."

Also again, Aug. 26, 1864, they wrote:

"We had hoped to have been able to send you an invoice of "your wool, but the trade then on hand when we last wrote, fell "through, and consequently we had to look up another lot; we "have now completed it, and shall send you an invoice just as "soon as it is weighed, which we think will be in a few days."

Also, on Sept. 2d, 1864, they close this purchase and contract with Aylsworth, as follows:

"We enclose you account purchase of 100 bales wool, a choice "lot; should have sent you the same before, but had some difficulty "to get the weights, and had some delay in getting it at all; but "the sale to us finally stuck. We know that this lot is all right."

It appeared upon the trial, that the 100 bales were purchased at Charleston, Ills., more than 100 miles from Chicago, that plaintiff, Culton, examined from 15 to 22 sacks of the wool when he made the purchase, upon Aug. 22d, 1864; that it was purchased of a Mr. Clement, weighed, the weight of each sack marked upon it, together with a shipping mark, thus, [c.], all on the 22nd day of Aug., 1864, and on the same day was shipped for Chicago. That on the next day, Aug. 23rd, plaintiffs made settlement in their office, in Chicago, with Clement, took a bill of purchase, showing weights, &c. That afterwards, Nov. 2, 1864, Aylsworth placed the further sum of $5000 in plaintiff's hands as margins on the wool. That afterwards, on Feb. 15, 1865, Parker, Culton & Sprague, with Aylsworth's consent, shipped the 100 sacks of wool to Hallowell & Coburn, Boston, Mass., (who were the agents and correspondents of these plaintiffs below,) where it was sold in the month of April, 1865, by Hallowell & Coburn, and accounts therefor rendered to Parker, Culton & Sprague, from which they made up their balances they sued for in this action.

Aylsworth at no time saw said wool, and all he knew about it was what was contained in Parker, Culton & Sprague's letters as above set out, until in the latter part of April, 1865, he received a letter from Hallowell & Coburn, informing him that the "wool was a mixture of all grades, and in inferior condition, "and not saleable, except at a discount from market price." Also informing him they could not recognize him as having any right to control the wool, as *they* only knew Parker, Culton & Sprague as *their* principals. Upon which information Aylsworth immediately informed Parker, Culton & Sprague, that he could not accept such wool, and demanded a return of the $11,000 with interest.

Upon the above facts the issues were,

Did the plaintiffs, as factors, do their duty, in filling the order Aylsworth gave for the *purchase* of the wool; and in their further management of the wool after the purchase was made?

In relation to these issues, we think the court below committed numerous errors.

First—In its rulings upon the admission of evidence, and

Second—In refusing, as also in giving instructions to the jury.

The facts upon the pork sale, pertinent to the error complained of are:—

Plaintiffs, Parker, Culton & Sprague, held for Aylsworth 150 bbls. prime mess pork, bought at $36.75 per bbl.; upon which Aylsworth advanced $2,000. On April 20th, 1865, Aylsworth negotiated a sale of said pork to a responsible purchaser at $25 per bbl., and ordered plaintiffs to execute the sale. The proceeds to be received by plaintiffs, and applied first, to the discharge of any indebtedness Aylsworth might owe on the pork, and second, if an overplus, on other balances, if any were due

them from Aylesworth. Plaintiffs refused to execute this sale; but required Aylesworth to pay up his entire account with them first. Their refusal is in this language: "Can't transfer pork "until your account is paid up." They held the pork until June 14th, 1865, when they sold it on their own motion, at $19 per bbl.

The issue upon these facts was—were plaintiffs bound to account to Aylsworth for this pork at $25 per bbl., the price at which he had negotiated a sale of same?

In relation to which we think the court below erred in refusing, also, in giving instructions to the jury.

All of the above facts appear in the bill of exceptions. T. R. pp. 10–19.

The record further shows that, upon the hearing of this cause at Nov. term, 1866, the jury found for Aylesworth in the sum of $10,266.87, which verdict the court set aside upon motion of plaintiffs.

Then at Nov. term, 1867, when this cause again came on for hearing, the jury returned a verdict for plaintiffs in the sum of $3,000.00. Motion for new trial by defendant overruled, and judgment on the verdict; from which defendant below prosecutes this writ of error.

We shall present the questions to this Honorable Court in the order above stated, and argue the errors complained of, in the order they appear in the record.

I.

ARGUMENT.

ERRORS IN THE ADMISSION OF EVIDENCE.

First—The first error appears in Bill of Exceptions, as follows. We quote from the record:

"That Culton (one of the plaintiffs,) examined from 15 to 22 "bales of said 100, and decided upon such examination, and from "the information derived from others, that all of said wool had "been clipped from two flocks of sheep; that the entire 100 "sacks was of medium grade, and in merchantable condition; "and said Culton, as witness on plaintiff's behalf, was permitted "to testify; that while making such examination, Clement, of "whom they claim to have purchased, said that he (Culton,) was "very particular, and that the other bales of wool were just like "these examined."

Error in admitting evidence of Clement's statements.

This error is too patent to need any extended argument, or citation of authority.

It falls within the rule, as to the most objectionable kind of *hearsay* evidence. It is the statement of a third party, made

without the presence of Aylsworth; and made, too, by a party, at the time, interested, in negotiating a favorable bargain with Culton.

The first part of the statement, as to Culton being "very particular," is an opinion, expressed in laudation of Culton's *diligence;* the second part is a representation as to the *quality* and *condition* of from 78 to 85 bales of wool, that Culton never examined. Of course Culton could not, of his own knowledge, testify as to the *grade* and *condition* of this 78, or 85 sacks; having only seen the outside of the sacks containing the wool, if even that. It was, however, necessary for plaintiffs to give the wool in these sacks a character within the limits of the order of Aylsworth, by some means or other, and resort was had, to *ex-parte* representations of interested third parties.

This error cannot be regarded as harmless; especially when examined in the light of the further evidence admitted, and the instructions of the court, hereinafter discussed; which required the plaintiffs, as matter of due care and diligence, to examine only 8, or 10 sacks of wool out of 100, to determine the grade and condition of the entire 100 sacks. Because in this view, all information obtained, over and above the examination of the 8, or 10 sacks, would be *extra* diligence, on plaintiffs part.

It will not, we apprehend, be insisted before this court, that such statements of Clement form any part of the *res gestae;* as between the parties to this record; and therefore we will not further notice this view of the question.

The rule as to the admissibility of evidence of this character, has been settled by this court, for more than fifty years, adversely to the ruling of the court below, in this case. In the case of Mima Queen and Child, *vs.* Hepburn, 7 Cranch, 290, decided Feb. 5, 1813, Chief Justice Marshall states the rule thus: "* * * hearsay evidence is in its own nature inadmissible. "* * Its intrinsic weakness, its incompetency to satisfy the "mind of the existence of the fact, and the frauds which might "be practiced under its cover, combine to support the rule that "hearsay evidence is totally inadmissible."

This court, in the above opinion, approved of the reasoning of Lord Kenyon Ch. J. and Grose, J., in Rex, *vs.* The Inhabitants of Eriswell, 3. T. R. 707, wherein the *exparte* deposition of a pauper, to prove a settlement, was held inadmissible, as hearsay evidence, although the same had been officially taken before magistrates.

This ruling, in Mima Queen and Child, *vs.* Hepburn, was revised and confirmed by this court, in the case of John Davis *vs.* Wood, 1, Wheat. 6, 8. Such evidence is never admissible to establish private facts, such as "Culton's diligence," or the *grade* and *condition* of a certain 85 sacks of wool.

Second—The second error complained of is found in T. p. 11, as follows:

"Plaintiff Parker, as witness on plaintiffs' behalf, was allowed "to testify as follows:

"*Question*—"Will you state what report, if any, Mr. Culton "made to yourself and your other partner, Mr. Sprague, as to "the result of his inquiries to fill the order of Mr. Aylsworth for "wool?"

"*Answer*—He said he had looked at some lots of wool, and "that there were one or two lots, which he thought would "answer; but should look these over again thoroughly before "deciding positively to conclude the bargain. He mentioned "two lots, one at $1.07½ and one at $1.05."

This item was reserved as a sample of proof of *diligence*. It is more objectionable as hearsay evidence, than the error above discussed, and all that we have above said is applicable here without being repeated.

This is wholly inadmissible upon other grounds. The subject of the interrogatory is wholly foreign and irrelevant.

The true inquiry in this case should have been this: Did plaintiffs, in *fact*, purchase the article defendant ordered? Not what efforts did they make to get it; nor, what reports they made to one another about such efforts.

This may be evidence of *diligent conversations*, and *reports*, by these plaintiffs among themselves; but it is no evidence that such reports are *true;* and even if the reports are true, it is then no evidence that the wool plaintiffs did buy was of a *medium grade*, and in *merchantable condition*.

We shall not trouble the court with citations of authority upon this point.

We however call the especial attention of the court to the injury worked to Aylsworth by the admission of such evidence. This evidence was admitted to show that plaintiffs had used *diligence* to obtain the article, and by reference to the instructions to the jury hereinafter discussed, it will be observed that the court, measured the entire responsibility of the plaintiffs by the "good faith, skill, care and *diligence*" plaintiffs used in complying with what was claimed to be a custom of general commission merchants, existing in Chicago at that time, which custom, lowered the standard of *diligence* almost to the point of entirely dispensing with it. At least, it is lowered to such an extent, that evidence of this kind would enable a jury, under the instructions given, to say, that the plaintiffs had been *diligent*.

Third—The third error presented embraces two exceptions. T. p. 11, as follows:

"The plaintiffs also gave evidence tending to prove that, in "the summer and fall of 1864 * * * the Chicago mar- "ket for medium wool was active and excited, in consequence of "the demand * * * * and that consequently the "grading of wool in the Chicago market, was not so close, and "the examination of it by buyers and commission merchants not "so exact during that period as before and since."

This evidence was admitted over defendants objections, as the record states, "on the ground that usage prevailing at Chicago, "at the time of the purchase of the wool, in question, touching "the purchase of medium wool, was competent in evidence on "the point, whether the plaintiffs exercised due care in purchas- "ing said wool."

"The plaintiff's also gave evidence by *experts* tending to "show that the usage by commission merchants in Chicago dur- "ing the excited market in 1864, and during the war of the "great rebellion, was as matter of due care and diligence, to ex- "amine 8 to 10 (as stated by some witness,) 12 to 15 (as stated "by others,) and 15 to 20 (as stated by others,) bales of wool out "of 100 bales, to determine the grade and condition of the en- "tire lot of 100 bales, in filling orders of the kind given in this "case; and that such examination would amount to reasonable "care in filling such orders in Chicago, in 1864, according to the "usage of commission merchants in that city during that time."

This entire evidence was admitted to establish a supposed custom of merchants.

We submit that it was wholly incompetent in this case.

First—It was not pertinent to the real question, in the case.

Second—In this case, there were positive instructions given by Aylsworth in writing as to the *quality* of the article he desired, and it is not competent, for a custom of merchants to substitute an article of a different quality, for the one ordered.

Third—The usage, sought to be established by this evidence, is wanting in every essential particular, that constitutes a valid custom of merchants.

1. The real and only question proper for investigation on this point in this case, was, as has already been stated, viz: Did the plaintiffs in *fact* purchase, a *medium grade* of wool, in *merchantable condition*; in substantial compliance with the order of Aylsworth?

All evidence in relation to the *purchase*, that was not pertinent to this point, should have been excluded.

It seemed to be tacitly conceded, that the wool plaintiffs obtained, was not such an article as Aylsworth ordered them to buy; and they were shielding themselves from the consequences of their failure, with this usage.

2. Where there are positive instructions given, they are to be *strictly* obeyed by the factor, in all things to which they relate. This is a primary principle of the law, subject to no variance by custom; nor, is the rule subject to the agent's discretion.

Story on Agency, Bennett's Edition, Sec. 192, states the rule thus:

"In the first place, it may be stated to be the primary obliga- "tion of an agent, whose authority is limited by instructions, to "adhere faithfully to those instructions, in all cases to which they "ought properly to be applied."

Aylsworth's order was clear and unambiguous, it defined the

quality, or *grade*, of the article he desired. He said: "buy medium wool," which clearly means, wool, the fiber of which is of *medium* fineness, neither *coarse* wool, nor *fine* wool; but that between the two.

It is clear, that this instruction, limited plaintiffs as to the quality and condition, of the article, they were to purchase; and if plaintiffs failed to purchase, substantialy the article ordered, it would be a failure upon their part to fill the order, and the purchase by them, of wool of any other grade, or condition, would not bind Aylsworth; no matter what the custom was, as to the mode of selecting such wool. They have no right to follow a custom that will surely fail to obtain the article ordered. Aylsworth had the right to select the article in which he wanted to invest his money. Then, after he has done so, and ordered his agent to purchase same for him, it does not lie in the mouth of such agent to tell him, he shall accept instead thereof, some other article, and then such agent defend himself upon the grounds, that he had complied with a custom, which would protect the agent, to the great damage of the principal.

Indeed, the doctrine is entirely new, that an order for a specific article, can be filled, with a *custom of merchants*, instead of the *article ordered*.

Story on Agency, Sec. 200, says: "If an agent, authorized to "purchase goods, should deviate from his orders as to price, "quality, or kind, or otherwise, the principal would not be "bound." This authority is sustained, by all reputable writers and opinions upon this point.

The above is the rule, even where the purchase is an advantageous one to the principal.

"The mere fact, that the bargain which is made, will be more "beneficial for the principal, will not avail the agent, if it be dif- "ferent from the substance of the authority. Thus, if A author- "ize B to purchase a particular house at a certain price, and B "purchase another house at a lower price, which is really a bet- "ter house, still A is not bound thereby; for the estate, is not "that, which was authorized to be bought."

Story on Agency, Sec. 175.

2 Kent's Com. 618, 619, (6th Ed.)

"If the orders of the principal are free from ambiguity, "the factor is bound to strict compliance, and no motive con- "nected with the interest of the principal, however honestly en- "tertained, or wisely adopted, can excuse a breach of it." 3d Circ. (Pa.) 1825; Courcier *v.* Ritter, 4 Wash., C. Ct., 549.

"If the principal direct his factor to load a vessel with goods "of a certain kind, and he loads her with goods of another des- "cription, the former is not bound to accept them, nor liable for "any charges attending them."

Urquhart *v.* McIver, 4 J. R., 103.

Williams *v.* Littlefield, 12 Wend., 362.

The case of Bell *v.* Cunningham, 3 Peters, 69, is strongly in

point as to the strictness, with which this court requires an agent to obey instructions of the principal. In this case, Cunningham & Co., merchants of Boston, Mass., had let their vessel, the Halcyon, to Mess. Atkinson & Rollins, of the same place, to carry a cargo of sugar from the Havanna to Leghorn. The cargo was consigned to Messrs. Bell De Yough & Co., Merchants of Leghorn; and Cunningham & Co., addressed a letter to them, instructing them to invest the freight, which was estimated at 4,300 pestos, 2,200 in marble tiles, and the residue, after paying disbursements, in wrapping paper. The instructions also contained an estimate by Cuningham & Co., of the probable amount of the freight, and amount of the disbursements and the amount of residue there would be for investment in wrapping paper. Bell De Yough & Co., on receipt of these instructions, previous to the arrival of the Halcyon, made purchases of wrapping paper, in good faith, to about the amount it was estimated in the instruction, there would be to invest in such paper. When the vessel arrived and its cargo was disposed of, it was ascertained, after paying disbursements, that the balance would but little more than pay for the wrapping paper already contracted. The amount of overplus being so small, that Bell De Yough & Co., coucluded it would be best to invest this small overplus in wrapping paper also. It not being sufficient to buy the amonnt of marble tile mentioned. They shipped the paper on board the Halcyon to the Havana, and it was sold at a loss; whereas, if they had bought and shipped the marble tile as ordered, it wonld have been sold at a profit. This court held that Bell De Yough & Co., as agents, had departed from their instructions, in not purchasing the marble tile first, and complying literally with the instructions of Cuningham & Co. The "good faith, skill, care and diligence" of Bell De Yough & Co., was no answer for a breach of positive instructions, as it was not a question of that kind; the only question was, did they fill the order Cunningham & Co. gave, and that is the only proper question on the point of the purchase in the case at bar. Not what did third parties say about it; nor what efforts did they make to get it; nor what reports they made to one another about such efforts: nor what was the custom of Chicago General Commission Merchants, in relation to the mode of selecting a particular grade of wool. But solely, did Parker, Culton & Sprague, purchase for Aylsworth a *medium grade of wool, in good merchantable condition*, in substantial compliance with Aylsworth's instructions?

Custom, or usage may be permitted, to control time, place, amount and manner; but it never can in fact control, change or determine the natural properties of any article. The quality of the fiber and condition as to cleanliness and neat handling of the fleeces of wool in a certain 100 bales, can only be ascertained by actually subjecting the wool itself to, and bringing it in contact with, two of the five physical senses, to-wit: The sense of *sight*, and that of *touch*. Also, these two senses must be educated and

skilled in the business of detecting the properties of the article. It is a moral, legal, intellectual and physical impossibility, to determine the grade and condition of the wool in any other way. Hence a custom that attempts to determine these facts, without using these two skilled senses, is an absurdity.

It is therefore clearly seen, that evidence of this usage, could throw no possible light upon the true inquiry in this case. It would never enable the jury to tell, whether the wool plaintiffs purchased was of "medium grade, and in good merchantable condition," as ordered; hence it was wholly irrelevant.

Third—This evidence wholly fails to establlsh a valid custom of merchants that can in any degree be recognized as a rule of law governing this case. It also fails to establish an usage that can be properly applied to the interpretation of any part of the contract in issue between the parties to this record.

It was not claimed, that this usage, established what was, and what was not, a medium grade of wool; but simply the *mode* of *selecting* a particular grade.

Now, a custom of merchants, to rise to the dignity of a rule of law, must contain seven (7) essential requisites; for, "when a "custom is actually proved to exist, the next inquiry is into the "legality of it; for if it is not a good custom, it ought to be no "longer used; "*malus usus abolendus est*," is an established "maxim of the law." Then to bring this custom, or usage of these general commission merchants, of Chicago, to the test of the seven essential requisitss, we find that it fails in every essential particular.

1. For a particalar *custom* to acquire the force of law, it "must have been used, time whereof the memory of man run-"neth not to the contrary." We do not insist that an *usage* must have existed for this length of time, before it can be properly used to interpret the obligations of a contract; but we do insist, that a local usage must be brought to the knowledge of a party, before such party can, or will be bound by it, when it has not existed for a sufficient time to acquire the force of public law. Also, we insist that an usage can never be invoked to impair the obligations of a contract, or defeat the fulfillment thereof. Usage can perform but one office; that of interpreter. To enable the court to enforce the contract according to the real terms of same, and the intentions of the parties when they entered into it.

The proper application of an usage was made by this court in the case of Renner *vs.* The Bank of Columbia, 9. Wheaton 581. The point as applicable to our argument, is as follows:

A custom of all the banks in the District of Columbia to demand payment, and give notice to indorsers of negotiable paper on the fourth day of grace, which began upwards of twenty years ago, and has been uniformly practiced on, and which was known to, and well understood by the defendant when he indorsed the note in question, is to be considered as entering into

the contract, and a demand and notice, on the fourth day of grace were sufficient to charge him.

The usage under discussion in the case at bar, was not made the interpreter of the obligations of the written contract between the parties to this record; but it only served in this case to relieve the plaintiffs below from the legal consequences of their failure to fill the order Aylsworth gave. This point will more fully appear in a subsequent part of this argument in discussing the instructions given to the jury.

In all respects, except as to time, an usage must contain all the essentials that make a good custom.

2. This usage was not *continuous*.

It was only claimed by plaintiffs to have existed, as the record states, "during the excited market in 1864, and during the war "of the great rebellion."

Now, we fail to see that the "war of the great rebellion," so often referred to in connection with this Chicago custom, has anything to do with such custom, or this case. We are aware that war, pestilence and famine, in localities where they, or either of them actually exist, are sometimes such impediments to the performance of an obligation, as to excuse a non-performance; but, this court judicially knows, that it is not *true* that any such existed at Chicago in 1864, or at any other time. Moreover, the *war* is not made the basis of the departure, the "excited market" is plead as the reason. Which, so far from being an excuse for such departure, only serves to prove a fact, not complimentary to general commission merchants of Chicago, viz: That the "excited market" gave the opportunity to perpetrate frauds by pushing upon customers worthless articles; and they too eagerly embraced it.

The record further states on plaintiffs own showing that "the "grading of wool, in the Chicago market was not so close, and "the examination of it by buyers and commission merchants, "not so exact during that period, as before and since;" showing clearly that a different custom prevailed *before* this "excited market" in 1864, as well as *since*. Thus we see that plaintiffs own evidence shows that this usage only prevailed for a short time; and more, that these plaintiffs below, who are general commission merchants of Chicago, and who are seeking to reap advantage in this case by such usage, have themselves abandoned it. If it was a good usage, why did they themselves abandon it, and still seek to bind others to it. Their own abandonment of it, is strong proof of the worthlessness of such usage.

3. "This usage to be good, must have been general, or "peaceable and acquiesced in; not subject to contention or dis- "pute. For as customs owe their original to common consent, "their being immemorially disputed, either at law or otherwise, "is a proof that such consent was wanting."

Now, the wool merchants of the city of Chicago, whose spec-

ialty was dealing in wool, stoutly deny that such usage ever prevailed with the trade at Chicago, at any time. The record states the rule of the wool merchants thus: p. 13.

"That the wool merchants of the city of Chicago examined "each fleece of wool in filling orders of the kind given in this "case, and that such usage had never been varied."

Here, is what contains some of the true elements of a good usage, or custom, and it clearly disputes the one under discussion, and conclusively shows that the *mutual consent*, necessary to make the usage complained of good; is wholly wanting.

While upon this point, we insist that if any usage is to prevail, and be made a rule of law in this case, it must be the usage of the wool merchants, whose specialty is dealing in that article. And if these plaintiffs want to obtain the benefit of a custom, in relation to wool, they must comply with the custom as established by the wool merchants. A general commission merchant buys and sells any and everything in the market, according to orders, and has no specialty in any article of trade. In the nature of things it would be ruinous to the trade to permit him to establish rules and usages, in derogation of the rights of those whose specialty is in any given article.

"4. Customs must be reasonable, or rather taken negatively, "they must not be unreasonable. Which is not always * * "to be understood of every unlearned man's reason, but of arti- "ficial and legal reason warranted by authority of law."

This usage in question is very *unreasonable*. The examination of one bale, or sack of wool, is no indication as to what another sack contains. If this usage, to examine 15 sacks in 100, is to prevail, it would compel Aylsworth to take the other 85 sacks, although they were filled with hair, or moss. Under this usage, it is immaterial about having the 100 sacks lying in *juxta-position*, to each other. The 85 had as well be beyond the seas The inspection of one *fleece* of wool, is no indication as to the *grade* and *condition* of *another fleece*, although they may be in the *same sack*. This being true, it becomes grossly unreasonable, to allow the inspection of one sack, to determine the grade and condition of eight, or ten others.

Again; this rule or usage is unreasonable, in dispensing with the use of *skill*. The inspector may possess the highest order of skill, yet under this custom it would avail nothing; because the article is not brought to the test.

Again; it dispenses with *diligence;* because it is no inspection, or examination, in any sense, of the 85 bales. It is too clear for argument, that such an inspection must and will always fail, to accomplish the end sought.

"5. Customs ought to be *certain*. A custom to pay two pence "an acre, in lieu of tithes, is good; but to pay sometimes two "pence, and sometimes three pence, as the occupier of the land "pleases, is bad for its uncertainty."

This custom, or usage, is most clearly bad for its uncertainty.

Thus: some examine 8 to 10 bales, others 12 to 15, and still others 15 to 20, and the same merchant varies his examinations in like manner as he pleases.

"6. Customs, though established by consent, must be (when "established) *compulsory;* and not left to the option of every "man, whether he will use them or no. Therefore, a custom, "that all the inhabitants shall be rated, toward the maintenance "of a bridge, will be good; but a custom, that every man is to "contribute thereto, at his own pleasure, is idle, and absurd, and "indeed no custom at all."

From the record as quoted above, it is clearly proven that this usage in dispute imposes no obligation upon the merchant as to the number of bales any of them shall examine, and no two seem to observe the same rule of inspection. It is varied to suit the convenience of the party making the examination, and whatever the merchants pleasure, is in a given case, is by this usage approved, and thus, his *pleasure* is made the *rule,* instead of a definite and compulsory custom.

"7. Lastly, customs must be *consistent* with each other; one "custom can not be set up in opposition to another. For if "both are really customs, then both are of equal antiquity, and "both established by mutual consent; which to say of contra-"dictory customs is absurd."

This usage under discussion is glaringly *inconsistent.* A rule to examine 20 bales is inconsistent with one to examine only 8; and both of these, are inconsistent with one to examine *every fleece.* It is impossible that all, and each of these usages, should exist at the same time, in the same market, and all of them be such, as the courts will enforce as sound and just rules of law. If the court should attempt, an interpretation of the contract in the case at bar, by one of these usages, which one is it to select and engraft into this contract, as being the one, these contracting parties had in view, and upon which their minds met at the time of contracting? To apply any of them, would most clearly be to make an addition to the contract, it, however, is complete without any addition; there was nothing left to be supplied.

It was in relation to the allowance of such usages as this, that Mr. Dunlap says in his edition of Paley on Agency, "Of the two "alternatives, it is assuredly better that the merchants receive "their law from the courts, than the courts their law from the "merchants."

In relation to the admission of such evidence, Mr. Justice Story, in the case of Rogers *v.* The Mechanic's Ins. Co., 1 Story's Rep., 608, observes, "I own myself to be no friend to the indis-"criminate admission of evidence of supposed usages and cus-"toms in a peculiar trade and business, and of the understand-"ing of witnesses relative thereto. * * * Such "evidence is often—very often—of a loose and indiscriminate "nature, founded upon very vague and imperfect notions of the "subject; and therefore, it should, as I think, be admitted with

"a cautious reluctance and scrupulous jealousy, as it may shift "the whole ground of the ordinary interpretation of * * * "contracts."

In the case at bar, the evil that Justice Story, in the above remarks, points out, is clearly seen to exist. The responsibility of plaintiffs was not measured by the actual contract that existed between these parties; but it was shifted on to this vague, uncertain, indefinite and supposed custom, with the establishment and regulation of which, Aylsworth had nothing whatever to do.

This usage, as a whole, is bad. Because in its very nature, it is no protection to the rights of the principal; and can only be a shield to a delinquent agent, and give exemption to a wrong doer in the perpetration of frauds.

Again; it was error in the court to permit witnesses to state "that such examination" of 8 or 10 bales "would amount to "reasonable care in filling such orders' as Aylsworth gave 'in "Chicago, in 1864, acccording to the usage of commission mer- "chants in that city during that time.'" This was permitting *expert* witnesses to decide the case, and take it away from the court and jury. The plaintiffs had already given in evidence the examination they had in fact made, of the wool in question; which was from 15 to 22 bales. Then these experts decide that this was *extra* care, or diligence, by stating that an examination of 8, or 10 bales, would amount to *reasonable* care, or diligence.

Now, as to what *reasonable diligence*, is, *per se*, is a question of *law* far the court. Next, as to whether *reasonable diligence* was in fact used in a given case, is a question of *fact* for the jury. Witnesses can testify that the rule in fact exists; but, as to what particular sum, such rule "would amount to," is wholly beyond their province, and solely a question of *law* for the court.

II.

ERRORS IN INSTRUCTIONS.

Errors in refusing, as also in giving instructions to the jury in regard to the wool contract.

1. The first error, to which we call the attention of this Honorable Court upon this branch of the argument, appears in T. pp. 12, 13 and 14.

"Defendant gave evidence tending to show that the wool plain- "tiffs purchased and sold, for which they claim balances in this "case, was not a medium grade of wool, in good merchantable "condition; but was a mixture of all grades, and in inferior "condition; and was not saleable, except at a discount from the "market price."

Also, defendant gave in evidence the order sent to plaintiffs, Aug. 19, 1864, by G. H. Aylsworth, both the telegram and letter,

which are copied above. In relation to which evidence defendant prayed the court to charge the jury, that;

"It must appear from the evidence, that the purchase the "plaintiffs claim to have made, was in *fact* made *substantially in* "*accordance* with the *instructions* given for that purpose, by de- "fendant and G. H. Aylsworth."

This charge the court refused;

Also, defendant prayed this further charge, as to the telegram and plaintiff's duty under it.

"The legal construction of the telegram is, that the plaintiffs "were to buy in the Chicago market as much wool of *medium* "*grade*, in *good merchantable condition*, as the $6,000, they were "authorized to retain as margins, would enable them to purchase; "and then to hold such wool subject to the order of Aylsworth.

"If the plaintiffs assumed to act upon this telegram, it was "their duty to fill the order given, and to that end, they were "bound to bring to the performance of that duty, *sufficient skill* "*and diligence*, to *select the article ordered*, and the purchase by "them of wool of any other grade, or condition, would not bind "Aylsworth, unless, with a full knowledge of the *grade* and *con-* "*dition* of the article they had obtained, he should afterwards "ratify and assent to what they had done." Which charge the court refused as prayed; but gave it with this modification: "*That if the plaintiffs, in purchasing the wool, exercised due skill and* "*care, they are not responsible, though the wool did not fill the order.*"

The court further charged the jury in relation to this purchase, that—

"Commission merchants to whom orders are given to pur- "chase goods of a particular quality or description for their "principals, if they undertake to fulfill such orders, are bound "to do so in good faith, and with proper skill, care and dili- "gence, and if they omit so to do, they are liable to their employ- "ers for the consequences of the want of such good faith, skill, "care and diligence, but they are not to be held responsible "as insurers, or guarantors. And if, having exercised such good "faith, skill, care and diligence, a mistake (occurs) as to the "*quality*, or *conditcon* of the goods, so purchased for his princi- "pal, the commission merchant is not in such case responsible."

The measure of the "*skill, care* and *diligence*" required, was given by the court in its charge to the jury on page 16 of record, which only requires the plaintiffs to have "*used such reasonable* "*skill, care and diligence, as was customary at that time, among com-* "*mission merchants in the Chicago market.*"

We have already seen that the "customary skill, care and dil- "igence, used at that time among commission merchants in the "Chicago market," was to examine 8 to 10 bales out of this 100, if it was their pleasure to examine no more. We have also seen, that it was a misnomer to call such an inspection *reasonable*. The plaintiffs had already shown that they examined from 15 to 22 bales of this 100. Then to apply these instructions to the evi-

dence, they would read: "If you find from the evidence that "plaintiffs examined 8 to 10 bales out of this 100, they are not "responsible, though the wool did not fill the order." Hence the jury under the instructions, could not say otherwise, than that plaintiffs had complied with the said custom.

It is here seen that plaintiffs were wholly excused from purchasing for Aylesworth a "medium grade of wool, in merchant-"able condition," in accordance with the instructions given. And it would seem, that it matters not what they got, just so they looked into 8 or 10 sacks before they purchased.

We submit, that the law on this point was correctly stated in the instruction as prayed by the defendant, and it should have been given without modification, to-wit: "*If the plaintiffs as-*"*sumed to act upon this telegram, it was their duty to fill the order* "*given, and to that end, they were bound to bring to the performance* "*of that duty*, SUFFICIENT SKILL AND DILIGENCE TO SELECT THE ARTI-"CLE ORDERED." This instruction, as prayed by Aylsworth, correctly interpreted the obligation of the contract, as it stood in *writing* between these parties. The charge as given by the learned Judge, leaves out of view entirely the obligation of the contract as it in fact, and in law existed, (and as to what that contract was, there was no dispute, as it was in writing,) and only held them as obligated to comply with the supposed custom of examining 8 or 10 bales out of 100; which custom, as we have already seen, is not entitled to any standing whatever in a court of justice; even where it raises no conflict with the plain and obvious meaning of a written contract, as it does in this case.

This custom becomes doubly obnoxious, when the real contract is in writing, and the custom rests alone in the uncertainty of human memory, and is so very uncertain, that no two witnesses are agreed as to what it is. And more, no one witness was satisfied in his own mind, as to what it was in fact, as each witness took in a range, such as 8 to 10, 12 to 15, and 15 to 20. No one of them was able to fix it certainly at 8, 10, 15, or any other number of bales that this custom required a commission merchant to examine.

It will be noticed that the court below did not hold that a compliance with this custom *was a fulfillment of the order*; but on the contrary, that a compliance with this custom only operated to shield the factor from responsibility, in case the factor *failed to fill the order*. The language of the court is this, when put together: "If the plaintiffs used such reasonable skill, care "and diligence, as was customary at that time among commis-"sion merchants in the Chicago market, *they are not responsible* "*though the wool did not fill the order.*"

We further submit, that the illustrations used by the learned Judge, in his negative reasoning in the instructions given, were calculated to and did mislead the jury as to the obligation these factors were under to Aylesworth. In speaking of the responsi-

bility of plaintiffs, he says: "*But they are not to be held responsi-*
"*ble as insures or guarantors.*"

Now, an *insurer* is one who, for a stipulated consideration, assumes a risk, that in case of damage to the insured within a limited time, he will make such damage good.

In the case at bar, these plaintiffs below were not asked to assume any risk, or to make any damage good in the future. Theirs was an obligation to perform a duty, in present time, simply what they represented themselves as competent to do.

This language was calculated to, and did, give the jury the impression that these factors were assuming risks at the instance of Aylesworth, for which it was unlawful to hold them answerable. And was explaining an obligation, by reference to another, which was wholly dissimilar. As these factors could and should have been held to the performance of the obligations they had assumed; and holding them to such obligations, would not in any sense have held them as insurers.

It was in evidence and undisputed, "that a person of compe-
"tent skill could, upon a proper examination, tell the grade and
"condition of any given quantity of wool." T., p. 12. This being true, there were no risks of any character assumed by these factors; hence there was no similarity to an insurance contract, and such an explanation could not do otherwise than make an erroneous impression upon the minds of the jurors.

A *guarantor* is one who is obligated to answer for the default of another. The nature of a guarantor's obligation bears no similarity whatever, to the obligation these plaintiffs were under to Aylsworth. They were not asked to answer for the default of *another;* but for their *own* default. This explanation by the learned Judge produced the impression upon the minds of the jury, that if Clement, had deceived plaintiffs as to the *quality and condition* of the wool, these plaintiffs could not be held liable for Clement's wrong-doing, when it is too clear for argument, that the contract between these plaintiffs and Clement has nothing whatever to do with the contract between the parties to this record. The parties to this case are principals in the obligations of the contract existing between them; and their rights and liabilities can never be explained, or modified by any contract between these factors and third parties, to which contract Aylsworth was a total stranger.

These erroneous explanations were not harmless, because they were used in explaining to the jury the extent and nature of these factors' liability as it related to the purchase of the wool in question, which was, and is, the first vital point in this case. If the court used these words in the sense of *warrant*, we take issue upon that. As below argued, we insist there was an express warranty in this case.

These factor's mistakes are not to be charged over to the account of Aylsworth, as between him and them. "A mistake in

the agent in obeying instructions of his principal renders the agent liable." Rundel *v.* Moore, 3 John. cas. 36.

The plaintiffs below, not only gave Aylsworth the fullest assurances, that they had complied with, and filled the order he gave, both as contained in the telegram and letter of Aug. 19th, but they expressly warranted that the article of wool they finally obtained for him, was the identical article ordered; both as to *grade* and *condition*.

On August 20th, 22d, 26th, and September 2d, 1864, Parker, Coulton & Sprague, make reply by letters to the telegram and letter of Aylsworth—all of which are shown, per copies above.

Aylsworth's telegram said, "*Buy medium wool.*" His letter said, "*Buy me medium grade of wool. Buy as good, and saleable "an article as possible, of that grade.*"

To this order plaintiffs replied in four several letters. On Aug. 20th, in reply to telegram, they say: "*We have bought for you a "lot of wool, and are going to look it all over, and if it meets with "our approval (i. e., if it is all right,) shall take it, and will let you "know further.*" Then they add, "*We consider this a tip-top bar-"gain.*" Then again on August 22d, they acknowledge receipt of Aylsworth's letter of 19th inst., and say: "Your account "stands credited with 6,000 dollars margins on wool. As soon "as we get the bill of purchase will send it to you." Then add, "*Your orders shall have our best attention at all times.*" Then four days after this, on Aug. 26th, they again write, "We had hoped "to have been able to send you an invoice of your wool; but "the trade then on hand, when we last wrote, fell through, and "consequently, we had to look up another lot; we have now "completed it, and shall send you an invoice, just as soon as it is "weighed." Then they follow this, with their final letter on the purchase, and close the contract on their part, seven days afterwards, on Sept. 2d, as follows: "We enclose you account of "purchase of 100 bales of wool, *a choice lot;* should have sent "you the same before; but had some little difficulty to get the "weights, and had some delay in getting it at all; but the sale "to us finally stuck." Then they add their express warranty, thus: "WE KNOW THAT THIS LOT IS ALL RIGHT." If there were any doubts, as to the "tip-top bargain" mentioned in their letters of Aug. 20th and 22d, they now expressly remove all such doubts,—for they have taken seven days to thoroughly examine this lot, and after this thorough personal examination, they describe this as "a choice lot," and then attach their express warranty, from personal knowledge, thus: "We know that this lot is "all right." To be "*all right,*" it must of necessity, be of "*medium "grade,*" and "*as good and saleable an article as possible of that grade.*" This language of plaintiffs is an express warranty of the strongest character, that the wool they had finally obtained, was the identical article ordered in both the telegram and letter. The letter had been received by them and they had fully "noted its contents," twelve days before they write this. This letter con-

tained the invoice of the 100 bales in question, it was written in relation to this 100 bales, and was the letter that closed the contract of purchase on plaintiffs part. It can not be regarded as a mere expression of an opinion; because it purports to state facts, and that too about a matter that these factors had in *trust* for Aylsworth, their principal. He had not asked them for an opinion about anything, they were not reporting their opinions; but were reporting to their principal what they had in fact done, in obedience to his order to "*Buy medium wool!*" "*Buy me medium grade of wool!*" "*Buy as good and saleable an article as possible of that grade!*" This warranty was given too, with reference alone to the *grade* and *condition* of the 100 bales covered by the invoice inclosed in said letter; because these were the two points and the only ones, that Aylsworth's order covered with particularity; but upon these, his order was imperative.

These plaintiffs should not be allowed to avoid the effects of this warranty by showing that the purchase they made was on the 22d of August, four days prior to their letter of August 26th, and twelve days before this one of Sept. 2d, and that the purchase was made before the receipt of Aylsworth's letter. The evidence of the purchase that governed Aylsworth's action, through the whole course of his dealing with plaintiffs was contained in the above letters. Their letters fix the real purchase as having been concluded by plaintiffs between the 26th Aug., and 2d Sept., as by theirs of Aug. 26th, it appears they had not gotten the weights, so as to enable them to send an invoice. Their evidence upon the trial, (see T. p. 11,) was; that the purchase was made upon Aug. 22d, and that this wool was weighed upon that day. That on the next day, Aug. 23d, they made settlement with Clement in their office in Chicago, and took a bill of purchase showing the *weights*, &c. Now, it is clear that the plaintiffs evidence on the trial in relation to the date of the purchase, is in conflict with their previous writings. This conflict remains unexplained, and cannot be explained, consistent with the truth of both statements. Both cannot be true. If it is true, that the purchase was completed upon the 22d, and they had the weights in their office on the 23d, it *cannot* be *true*, that they were delaying the transmission of the invoice on the 26th, for the purpose of *obtaining* the *weights;* and their warranting on the 2d of Sept. afterwards, that the lot they had completed the purchase of subsequent to Aug. 26th, was "*all right*," when no such purchase was made, would be false, and a gross fraud upon Aylsworth, which fraud has seriously damaged him, and these plaintiffs should be compelled to place him in *statu quo*, on account of their practicing such fraud. But, aside from this view, the record shows, that the whole contract of purchase was in writing, that Aylsworth had no knowledge in relation to said wool and the purchase thereof, except what he learned from plaintiffs letters, which are fully set out above. Then it is clear, that plaintiffs responsibility in relation to said purchase, must be

measured alone by their written contract, and they be compelled to make good their written warranty.

In this connection we further submit, that the court erred in charging the jury, in relation to Aylsworth's letter of Aug. 19th, T. p. 14, thus:

"But if the wool was bought at Charleston, before the partner "who made the purchase, could be informed of the contents of "the letter, the letter would not bind plaintiffs; otherwise it "would."

Plaintiffs admitted the receipt of this letter, at Chicago, Aug. 22d. Chicago was their place of business. Aylsworth had no knowledge of their buying wool elsewhere, than in the Chicago market. He never anthorized a purchase elsewhere; and in legal contemplation, any notice, or order, that was given to the firm, in relation to partnership business, at the plaintiffs place of business, is notice to the entire firm. Aylsworth addressed his letter to the firm of Parker, Culton & Sprague, and its receipt was acknowledged in the firm name.

Collyer on partnership. Perkin's Ed. sec. 442, 443.

Story on part., sec. 107, 108.

If the plaintiffs chose to go 100 miles away from Chicago, to make a purchase, without Aylsworth's knowledge or consent, instead of notifying him that the article he desired, could not be obtained in Chicago, it was a matter wholly at their own risk.

In addition to this, the correspondence of plaintiffs, above discussed, shows that plaintiffs did not complete the purchase until from 5 to 12 days after the receipt of this letter. The invoice for the 100 bales was sent 12 days after they had received this letter, and the plaintiffs warranty of Sept. 2d, was given with a full knowledge of its requirements.

It is too clear for argument, that Aylsworth understood from plaintiffs letter of Sept. 2d, that the wool they had obtained filled every requirement of this letter; and it is equally clear, that they *intended* he should so understand them. They knew, he could not otherwise interpret their correspondence, they also knew, that he had the right to so understand them, as they were acting in a trust capacity for him, and their representations were made in relation to their trust. They also knew that his subsequent action in regard to this wool was prompted by, and in accordance with such understanding. They are now estopped from claiming a release from the terms of this letter.

The record shows that Aylesworth understood from plaintiffs, that they had complied with the terms of his letter, for he afterwards advanced $5,000 more money, as an additional payment on the purchase they represented they had made, and still afterwards consents to incur the expense of the shipment of the wool to, and its sale in Boston, Mass. Also, the record shows plaintiffs *intended* he should so understand them, because they withhold from him all information that would produce a contrary belief. These plaintiffs at no time disclose to him the true

grade and *condition* of this wool, although they had full knowledge, and the means of knowledge, that the wool was not what they had represented, and warranted it to be. The record shows, (page 11,) that the wool was stored by plaintiffs in Chicago from date of purchase until February 15, 1865, upon which date it was shipped by Aylsworth's consent to Boston. It further shows, (page 18,) "that on the arrival of said wool in Boston, the plain "tiffs were advised by their Boston correspondents that said 100 "bales, received by them, was in very inferior condition," and further, "that plaintiffs never communicated said information to "defendant." Thus it is clearly shown that plaintiffs did not desire to correct the false impression their letters had produced; but intentionally permitted Aylsworth to continue in the belief that his 100 bales was "a choice lot" of the *grade* and *condition* specified in his letter of August 19th. Aylsworth was not undeceived until in April, 1865, he received a letter from Hallowell & Coburn, Boston, Mass., after they had opened and inspected this wool, informing him that this 100 bales was, in the language of the record, (page 12,) "a mixture of all grades, and in infe- "rior condition, and was not saleable, except at a discount from "market price." Upon which Aylsworth immediately informed plaintiffs he would not accept it, and demanded the return of his eleven thousand dollars with interest. Thus the record proves conclusively that Aylesworth interpreted plaintiffs' letter of September 2d, to warrant a fulfillment of his of August 19th, for while he remains of the belief that he held "a choice lot" of wool, he is fulfilling in good faith every obligation such contract imposed upon him. As soon as he learns that plaintiffs' representations are false, and that he is being grossly defrauded, he reverses his action, and demands to be placed in *statu quo*.

The rule of law is well settled, that these plaintiffs are bound by the interpretation that Aylesworth placed upon their letters, if the one he gives them is fairly deduceable therefrom. Such is the rule, where the writing is ambiguous, (Story on Agency, sec. 74,) and it is applicable with greater force where there is no ambiguity, as in the case at bar.

If these plaintiffs wanted to avoid the force of the letter, and did not intend to be bound thereby, it was their duty, on receipt of same (if they had already purchased wool that was not up to the requirements of the letter,) to inform Aylsworth of the true character of the article they had otained, and wherein it did not fill the specifications contained in the letter, as he could then be in condition to take such action as would save him from loss. Plaintiffs failing to do this, consent to be bound by the letter. Upon the other hand, if they had not purchased, and their correspondence showed they did not purchase, until after the receipt of this letter; then, it was their plain and obvious duty, to purchase wool of the *grade* and *condition* specified in the letter, else they buy nothing for Aylsworth.

Now, we submit, that after plaintiffs had consented to be

bound by, and agreed to fulfill, and warranted the fulfillment of the requirements of this letter, it was grevious error in the court to give the charge; that plaintiffs were not bound by it, unless the particular partner who made the purchase was advised of its contents at Charleston before purchasing.

The record shows other exceptions, to the instructions, in relation to this purchase; but it is unnecessary to further specially argue them, as the arguments already set forth above are applicable to them also. For it will be noticed, that the court in each and all of its instructions to the jury, relative to this purchase, makes a compliance with this supposed usage, of examining 8 or 10 bales out of 100, the sole test, whereby plaintiffs' liability was to be measured, and did not require the jury to find whether plaintiffs had purchased for Aylesworth the article he ordered. All of which, we submit, was error, for the agent shall not, in any essential particular exceed his commission.

Second—The second error, under this branch of the argument, is the instructions of the court, in relation to the plaintiffs' responsibility in the shipment of the 100 bales to Boston, and subsequent thereto.

All of the evidence in relation to directions of defendant, for the shipment of said wool, is in writing, and appears on pages 16 and 17 of the record. Also, the evidence of the holding by the Boston merchants, their sales and accounting therefor to the plaintiffs; which evidence shows the following facts:

First—That the only connection Aylsworth had with said shipment, &c., was that he *consented* that plaintiffs might ship same. Which consent was given after repeated and urgent solicitations by plaintiffs for permission to ship, and their flattering representations, as to the advantages to be gained by such shipment.

Second—That plaintiffs selected their own agents in Boston, shipped the wool in their own names, held it in their names, and as their wool; their Boston agent refused to permit any other party to control it, they insured it in transit as their wool and in their names, drew against the wool to their Boston agents for $10,000 for their own use, ordered the sale, had it sold on their account, they continued their liens upon it, had the accounts of sales, accounts current, and interest account of the Boston house made out in their names, and forwarded to them at Chicago, they accepted same, and made settlement with the Boston house, and then made up their accounts with Aylsworth from the accounts received from their Boston House, and sued in this action, for balances they claimed on the accounts as rendered by their Boston agents.

"In relation to which the court charged the jury." T., p. 18:

"That if you find, that without fault of the plaintiffs, the wool "in transit to Boston got so mingled or confused with other "sacks of wool, or got mixed in the Boston house with other "wool, so that its identity was lost, these plaintiffs would not be

"responsible for the consequences, if the defendant assented to, or "ordered the shipment to Boston."

We submit, that this instruction does violence, both to the law on the subject of the *confusion* of goods, and to the *facts* in this case.

The law on the subject of the confusion of goods, we think, is properly stated thus:

"It is a rule both of law and equity, that if a person having "charge of the property of another, so confounds it with his "own, that it cannot be distinguished, he must bear all the in- "convenience of the confusion; and, if it be a case of damages, "the damages given against him, will be to the utmost value of "the property."

Breckenridge *vs.* Holland, 2 Bl'k., 377.

This authority is supported by 2 Blackstone, 404, 405; 2 Kent 364; Parsons on contracts (4th ed.,) 474; besides numerous adjudicated cases. That the party permitting, or causing the confusion, is responsible to the party injured to the full amount of the damage sustained, is a point upon which there is no conflict in the authorities. The difference upon the subject of confusion, between the *civil* and *common law*, seems to have been, only as to the *extent* of the satisfaction.

The *civil* law allowed the innocent party the possession of the property intermixed; but, at the same time, allowed the party who caused the intermixture, a compensation for the property of his that was so intermixed.

The *common* law, also gave the entire property to the innocent party; but allowed the party causing the intermixture, no compensation whatever.

But so far as the doctrine of confusion is applicable to the instruction above complained of, all the authorities are agreed, to-wit: That the innocent party shall in no case suffer. This instruction casts the entire burthen of the damage upon the innocent party. It is too clear for argument that Aylsworth is wholly innocent of the mixture. The record shows, that he never at any time saw the wool; and all that he knew about it, was what he learned through the correspondence of plaintiffs. And when he consented that plaintiffs ship to Boston, he leaves the whole matter in their charge. His only connection with the said shipment is shown by his letter, as follows, of January 30th, 1864, in answer to plaintiffs two letters of January 20th and 24th, in which they recommend and urge the shipment:

"I think from contents of your letters, it will be best to ship "my wool to Boston for a better market, and sell it when and as "soon as you think the market will pay me best; all things "considered. Please ship it as soon as you can. Let me hear "from you often. * * *

"P. S.—I trust you will use the same diligence and care in "securing the freight, insurance, &c.. at as low a figure as you "would if the interest was all your own."

It needs no argument to prove that Aylsworth simply consented to this shipment, upon plaintiffs representetions. Also, that he left the whole control of the wool during transit, and also, in the Boston market, in their charge. In short Aylsworth had no control of it at any time; but plaintiffs had complete charge of it, all the time, from its purchase to its sale. This being true, if there was any intermingling of sacks, or mixing of the wool, it was done while in charge and under the control of plaintiffs. Whether there was *accidental* or *intentional* mixing, it was done, if at all, while in their charge, and they must bear the inconvenience of it. Even if done in the Boston House, it is at plaintiffs risk. For it is in their control and charge as much as it would be in their own house, at Chicago. This change of place to which Aylsworth consented, was no change of custodians. The Boston merchants were *plaintiffs* agents, and not *Aylsworth's*. Their acts were *plaintiffs* acts, and not Aylsworth's.

It is clear from the record, that plaintiffs sued Aylsworth, to recover balances they claim as due them, on account of a deficit occasioned by the sale of this worthless article of wool, in the Boston market. Now, is it possible, that Aylsworth can be compelled to pay a deficiency occasioned by the sale of a worthless article of wool, that he never owned or heard of? If plaintiffs lose Aylsworth's wool, or wool that was supposed to be his, they cannot pick up some other wool, without his knowledge or consent, and sell it, and then call on him to account for deficits occasioned by such sale. Such a rule of law, is an entire stranger to the books, to the history of jurisprudence in the civilized world; and is repugnant to the common instincts of justice.

Again, this construction is erroneus, because there was no evidence in fact to which it was applicable, that it was proper the jury should consider. There is no evidence of mixture in this record. The only evidence from which an inference of mixture could be drawn, was the difference in the descriptions of the lot purchased, and the lot sold. As we have already seen, the plaintiffs gave a glowing description of their 100 bale purchase. The description of the 100 bales sold in Boston, was not of kin in any part, to the description of the lot purchased; as the lot sold in Boston would be most aptly described by the word "worthless." But the plaintiffs, by accepting without objection, the account of sales rendered by their Boston Agents, as of, and for the 100 bales they had shipped to Boston, making up their own accounts from those rendered from Boston, and being notified by their Boston agents upon the arrival of this 100 bales in Boston, that "it was in very inferior condition," are not surprised at this description, never deny that it is a true description of the 100 bales they shipped; but recognize it, in every mode possible, as a true description; and then studiously withhold this description from Aylsworth. And more, the wool was in sacks when purchased, and plaintiffs carefully traced same, by a certain

shipping mark, thus: [C.], from date of parchase, through to the Boston house.

Now, after all this identification, by the plaintiffs themselves, as shown by the record, the jury were precluded from inferring a mixture; for it was not a question open to inference. Hence we affirm, that there was no evidence, proper for the jury to consider, to which this instruction was applicable.

The court should have instructed the jury, that, if they found from the evidence, that the wool plaintiffs shipped to, and sold in Boston, was not of "medium grade, and in good merchantable condition," their finding should be for the defendant. For that was the only kind of an article that Aylsworth consented they might ship; and a shipment and sale of any other kind, would not bind him.

Again, there could be no possible excuse for losing this 100 sacks of wool, nor any part of it, in transit. And it could not, in the very nature of the case, be lost, except by the grossest negligence, on plaintiffs part. The plaintiffs own showing, makes the weight of this entire 100 sacks 19,167½ pounds. This gives an average of nearly 192 pounds to the sack, (see pl'ffs bill of particulars). This court judicially knows what wool is, and that 192 pounds would make a large bulk, even when tightly packed in a sack. This court also takes judicial knowledge of the means of transporting such sacks. And it further judicially knows that if such sacks were properly labelled for shipment, their identity could not be lost in transit. Then this court further takes judicial knowledge of the natural properties of an article. It knows that after this wool was in the Boston wool house, it could not, and would not *chemically* combine and mix with other wool, like wines poured into the same vat; neither would it *mechanically* mix, as would wheat in bulk, without special effort by those handling it. It could only be mingled with other wool, so as to lose its identity, by special effort, made for that purpose, by those having it in charge, taking it out of the sacks, and intentionally mixing it with other wools.

Then it is clear that there was no danger of a loss of the identity of this wool, by "mingling" and "mixing," without plaintiffs being in fault.

Then again, a total loss, and destruction of this wool, by fire, would not authorize the plaintiffs to substitute another lot, and have it sold, as, and for such lost lot, and charge deficits thereon to Aylsworth. Then the conclusion is inevitable, that if loss, by *fire*, would not authorize such substitution, a loss by plaintiffs *negligence*, could not possibly authorize it.

There is no state of facts, that could, or can be imagined in this case, that would make this instruction a proper one. This is not an action to settle rights in relation to a *lost lot af wool*. It is an action to recover balances claimed by plaintiffs, because of a deficit upon the *sale of a lot of wool*. No question can possibly arise, as to who was in fault in losing the wool; because there

has been none lost, so far as known, in this case. This instruction is therefore wholly irrelevant to the evidence in this case, and the issues both of fact and law.

The injury done to Aylsworth, by this instruction, is too clearly seen, to need elucidation. It wholly relieves plaintiffs from selling for him in the Boston market, anything connected with the article he ordered them to purchase, and consented they might ship. While at the same time, it holds him liable to make up the deficit on somebody's wool, he knows not whose; notwithstanding, it is clearer than a ray of sunlight, that he is under no obligations whatever to pay for any wool, except such as he ordered plaintiffs to buy.

Another erroneous instruction appears in the record, on page 18, as follows:

"The defendant gave evidence tending to show that on the "arrival of said wool in Boston, the plaintiffs were advised by "their Boston correspondents, that said 100 bales received by "them was in very inferior condition.

"Also, evidence tending to show that plaintiffs never commu- "nicated said information to defendant.

"In relation to which a juror asked the court the following "question:

"Were the plaintiffs bound to communicate to the defendant "all the information they obtained concerning these transac- "tions? To which the court replied, in charging the jury—

"The plaintiffs were bound to communicate to the defendant "every fact which *they* deemed material to the defendant's in- "terest."

This makes the plaintiffs, the sole judges, of what was to the interest of the defendant. It only binds them to communicate such *facts* as "*they deemed material.*" The law is, they were bound to communicate "*all the facts*, and let Aylsworth decide their materiality to his interest. This instruction reverses the position of these contracting parties, and makes these plaintiffs the principals; and sets them as judges over Aylsworth's interest, to bind him, by their decision, as between him and them.

That the *grade* and *condition* of the article, which had arrived in Boston, and was about to be put upon the Boston market, was "*material to defendant's interest,*" is a fact that needs no proof. Whether these plaintiffs "deemed it material," is wholly unimportant. They were acting as Aylsworth's agents; this fiduciary capacity imposed upon them the obligation to reveal to their principal all the facts connected with this whole transaction.

In this case, they knew that Aylsworth deemed the *grade* and *condition* of the wool *material.* The orders under which they were appointed advised them of these facts. Then, it is not for them afterwards, to withhold from him information in relation to the *grade* and *condition* of this wool, and then excuse themselves, upon the ground that *they did not deem it meterial;* and that too,

just before the sale, which was the most critical time, as it would determine the amount of profit or loss to Aylsworth.

The withholding of this information, shows most conclusively that these plaintiffs acted in the *utmost bad faith* with their principal, whereas, the law required them to act in the *utmost good faith.*

The lowest order of good faith, required plaintiffs to make these facts known to their principal. And it was error of the gravest character in the court to excuse them, by allowing them to be the sole judges of their principal's interest. They should have reported, and awaited further instructions.

It is true, that in his letter giving consent that these plaintiffs ship the wool to Boston. he leaves the whole control and management of it to plaintiffs; but that consent and authority was given when Aylsworth was under the impression, created by plaintiffs' letters, that his was a "choice lot of wool," of "medium grade and in good merchantable condition." He had never consented that they might ship, manage and sell for him, a lot which "was a mixture of all grades, and all in inferior condi- "tion, and unsaleable except at a discount from market price;" and an authority given for a shipment and sale of wool of the former character, does not cover a shipment and sale of the latter.

The doctrine of *good faith*, in an agent's acts, becomes obsolete, if the rule laid down by the court in this instruction is to prevail. Because this makes the agent the sole judge, and of course, the agent would always decide in his own favor. And then this rule compels the principal, to abide the agent's decision.

III.

ERRORS IN INSTRUCTIONS ON SALE OF PORK.

The question in relation to the pork sale was, Were plaintiffs, as Aylsworth's factors, bound to obey his order to sell the pork?

In relation to the facts, as above stated, defendant prayed the following charge to the jury:

"In regard to the sale of the pork in controversy, if you find "from the evidence, that the plaintiffs did, in fact, purchase and "hold for the defendant certain pork, as alleged, and you further "find that the defendant made a contract of sale for such pork, to "C. W. Aylsworth, of Fulton City, Ills., at $25 per bbl., and or- "dered plaintiffs to execute the same, it was the duty of plain- "tiffs, as the defendant's factors, to have complied with the or- "der, and executed the sale; and then taken of the proceeds of "the sale, and first applied them to the discharge of the balances, if "any were due them, on account of such pork, and then applied "the overplus, if any, to the discharge of the other indebtedness "of the defendant to them, if any such there was.

"But if you find that plaintiffs refused to execute the order of "sale, and continued to hold the pork, and it declined in price, "and was afterwards sold by the plaintiffs, on their own motion, "at $19 per bbl., such decline must be alone at the risk of the "plaintiffs, and they must account to the defendant for the pork "at the price at which he ordered them to execute the sale."

This charge the court refused, and instead thereof, charged the jury as follows:

"In regard to the pork transaction, if you believe from the "evidence that the plaintiffs actually bought and held for the "defendant certain pork, and that the defendant sold said pork "for $25 per barrel, and notified the plaintiffs thereof, and ordered "them to execute such sale, it was the duty of the plaintiffs to do "so, and to have turned the same over to the new buyer, provided "they had no lein thereon for their per centage and charges, or "for general balances, in which latter case, they would not have "been bound to obey such order until such per centage, charges "and general balances were first paid, or tendered to them, either "by defendant or such new purchaser.

"But if the plaintiffs, without such cause as aforesaid, wrong- "fully refused to turn over such pork to such new purchaser, "and the market declined, or any loss on the pork followed on "such wrongful refusal, the plaintiffs and not the defendant, "ought to suffer the loss."

We submit that the court erred in refusing the instruction prayed, as, also, in giving the instruction as above set out.

We do not controvert, but admit the doctrine, that any property of the principal, held by his factor, is liable to a lien, first for balances due on account of this particular property, and second, a lien for general balances. But, we do insist that Aylsworth had the right to terminate his risk at his pleasure. Also, that he had the right to have this particular property sold, to enable him to discharge the liens upon this particular 150 bbls. of pork, in their order of priority. The circumstance that he procured for plaintiffs a purchaser for this pork, at $25 per bbl., makes nothing against him. He had the right to do so, if he chose. He did no act, nor did he attempt any, that would in the least affect these plaintiffs liens, or rights. He made no effort to take the pork from their custody and control; nor did he offer to control the proceeds, for the proceeds were to go into plaintiffs hands. He sought simply to have plaintiffs realize on this pork, that their liens might thereby be discharged, and his indebtedness to them liquidated. This was most clearly Aylsworth's right. The proceeds of the property to which the liens had attached, was the primary fund out of which said liens were to be satisfied. If the pork failed to realize sufficient to satisfy same, it would then be plaintiffs right to demand further funds. But at no time, and under no circumstances, would the factor have the right to demand full payment of all liens, before he makes sale of the property that forms the primary fund, that is

specifically pledged to the payment of such liens. Because in law such debts are deemed satisfied to the amount such specific property will realize; and that amount cannot usually be ascertained, until after a sale is made.

The authorities are all agreed upon the point, that the factor must sell, when ordered to do so by the principal. He never can hold the property at his principal's risk, after he is ordered to sell; if it is at all possible to make a sale.

He can, under certain circumstances, sell in violation of his principal's orders to not sell; but he never, in any case, nor under any circumstances, can continue to hold, at his principal's risk, after the principal has ordered the risk terminated. If he does hold, in violation of such orders, it is solely at his own risk.

Evans *v.* Root, 7 N. Y., (3 Seld.,) 186.

Bell *v.* Palmer, 6 Cowan, 128.

Lafarge *v.* Kneeland, 7 Cowan, 436.

Marfield *v.* Goodhue, 3 N. Y., (3 Comst.,) 62.

The reason of this rule is much stronger than precedent. To sell, is a termination of all risks; while to hold, must of necessity increase the liability of the principal, for interest, insurance, storage, &c., while at the same time, the increase in the value of the property is a matter of *great uncertianty*. The property is liable to decline in value, as it did in the case at bar.

The decline, in this case, was $6 per bbl., making a loss of $900, which would not have occurred, if these factors had obeyed the instruction to sell at $25.

This case alone fully demonstrates the necessity of an agents' being bound to obey literally such orders of the principal.

The court in the above instruction says: the plaintiffs were not "bound to obey such order, until such *percentage charges* and "*general balances* were FIRST PAID, or tendered to them, *either* by "*defendant*, or such NEW PURCHASER."

This rule bars Aylsworth from using the proceeds of this pork in paying these dues, and requires him to take other funds, not invested in the pork, and discharge entirely all indebtedness to plaintiffs, before he can have his pork sold.

Now, no proposition of law is better settled, than that Aylsworth was entitled to the proceeds of this pork, as the *first fund* with which to make such payment.

The part of this instruction that requires "*such new purchaser*" to pay all "*percentage, charges and general balances*" before he would be *entitled* to the pork, is most seriously erroneous, in any view that can be taken of it.

It needs no argument to show, that "such new purchaser" could be required to pay only $25 per barrel, what his contract called for, no more, and no less. He had nothing whatever to do with the "percentage, charges and general balances."

The value of this 150 bbls., at $25 per bbl., is $3750. Now, if the percentage, &c., due from defendant was $9,000, it is clear,

such purchaser need not pay $9,000, when his contract only called for $3,750

Then again, suppose the percentage &c., only amounted to $1,000 it is then equally clear, that plaintiffs were not authorized to deliver the pork on payment of that sum, when the contract required $3,750

The rule held by the court in this charge, wholly deprives Aylsworth, of the right to manage his own business. It places him completely within the grasp of these plaintiffs. It requires him to make payment, while at the same time, it withholds from him the means, whereby he could make such payment. Under this rule, the plaintiffs might have held the pork, without risk to themselves, until it become wholly worthless. Their selling it at any time, would be an act of *grace* upon their part, and not a matter of *right* to be claimed by Aylsworth.

Because of said errors, plaintiff in error, prays that the rulings and judgment of the court below, be in all things reversed.

JAMES BUCHANAN,
Attorney for Plaintiff in error.

We fully concur in the argument of our co attorney.

JOSEPH E. MCDONALD,
A. L. ROACH,
Of Counsel for Plaintiff in error.

POINTS AND AUTHORITIES FOR ORAL ARGUMENT.

I

Erroneous admissions of evidence.

First—Culton's evidence of Clement's statements, to prove diligence and grade. Hearsay and irrelevant. T., p. 10.

Second—Parker's testimony about conversations of plaintiffs among themselves in their office in Chicago; to prove diligence. Hearsay and irrelevant. T., p. 11.

Mima Queen and Child *v.* Hepburn, 7 Cranch, 290.

Rex *v.* The Inhabitants of Eriswell. 3 T. R., 707.

John Davis *v.* Wood. 1 Wheat., 6, 8.

Third—Testimony as to custom. T., pp. 11—12.

a—It was not pertinent to the real issue.

b—In this case there were written instructions, which precluded custom.

c—The custom sought to be established was itself invalid.

Story on Agency, Bennett's Edition, section 192.

Ib., sec. 200; Ib., 175.

2 Kents' Com., 618, 619. (6th ed.)

Courcier *v.* Ritter, 4 Wash., C. C't., 549.

Urquhart *v.* McIver, 4 J. R., 103.

Williams *v.* Littlefield, 12 Wend., 362.

Bell *v.* Cunningham, 3 Peters, 69.

Blackstone, vol. 1, 76.

Renner *v.* The Bank of Columbia, 9 Wheat., 581.

6 Curtis, 195.

Rogers *v.* The Mechanics Insurance Co., 1 Story's Rep., 608.

II.

Error in refusing, as also in giving instructions to the jury. T. pp. 12, 13 and 14.

1.—Compliance with orders,—Refused.

2.—Plaintiffs duty under telegram,—Refused, as prayed; but given as modified, *skill* and *care*.

3.—The courts' further charge, as to "good faith, skill, care and diligence." Measure thereof, T., p. 16. Insurers and guarantors. Warranty and mistake. Effect of letter of Aug. 19, 1864. T. p. 14. Partnerships—Collyer, Perkins' Ed., sec. 442, 443. Story, Part., sec. 107, 108. Story on Agency, sec. 74.

Rundle *v.* Moore; 3 John, Cas. 36.

4.—Plaintiffs responsibility in shipping to Boston, and subsequent thereto, T. p. 18. Confusion of goods.

Breckenridge *v.* Holland, 2 Blk., 377.
2 Blackstone, 404, 405.
2 Kent, 364.
2 Parsons on Contracts, (4th ed.,) 574.
15 Ves., 432, 2 Ves. & B, 265.
2 Johns, ch. 62 & 108.
9 Barbour, 440.

5.—Allowing plaintiffs to withhold information at their pleasure. T. p. 18.

III.

1.—Charge as given and refused on sale of pork. Duty of agent to sell when ordered.

Evans *v.* Root, 7 N. Y., (3 Seld.,) 186.
Bell *v.* Palmer, 6 Cowan, 128.
Lafarge *v.* Kneeland, 7 Cowan, 456.
Marfield *v.* Goodhue, 3 N. Y., (3 Comst.,) 62.

We submit the above, reserving the right, at our pleasure, to use other points and authorities by giving due notice, in accordance with the rules of the court.

JAMES BUCHANAN,
JOSEPH E. McDONALD,
A. L. ROACH,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE U. S.

No. [illegible]

ASAHEL AYLESWORTH,

PLAINTIFF IN ERROR,

vs.

RENSLOW S. PARKER, et al.,

DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

BRIEF OF PORTER, HARRISON & FISHBACK,

Attorneys for Defendants in Error.

INDIANAPOLIS:
W. P. HARDING, MIRROR, STEAM PRINTER.

1869.

SUPREME COURT OF THE U. S.

No. 251.

ASAHEL AYLESWORTH, PLAINTIFF IN ERROR.

vs.

RENSLOW S. PARKER, *et al.*, DEFENDANTS IN ERROR.

This was a suit brought by Parker, Culton & Sprague, the defendants in error, Commission Merchants in Chicago, against the plaintiff in error, to recover commissions for purchasing and selling wool and pork, and to recover the amount of their advances, &c., on the wool and pork in excess of the amount realized from the sale of these articles. The wool was purchased on account of one George H. Aylesworth, who, after the purchase thereof, transferred his interest therein to his father, the plaintiff in error. The pork was purchased on account of the latter. The pleadings are so general that they do not disclose as distinctly as might be desired the nature of the controversy.

It will be convenient, in argument, to separate the transactions relating to the wool from those relating to the pork.

On the 19th of August, 1864, George H. Aylesworth sent a telegraphic dispatch to Parker, Culton & Sprague, in the following terms:

"From ATTICA, IND., Aug. 19, 1864.

"To Parker, Culton & Sprague, *Chicago, Ills*:—"Buy medium wool, retain $6,000 as margins. G. H. AYLESWORTH."

This telegram was received on the day of its date. The direction to *retain* $6,000 as margins shows that this was not the first transaction of G. H. Aylesworth with the defendants in error.

There was evidence tending to show that on the same day G. H. Aylesworth wrote and posted to the Chicago house a letter of the following tenor:

"ATTICA, IND., Aug. 19, 1864.

"MESSRS. PARKER, CULTON & SPRAGUE, *Chicago, Ills.*:

"I dispatched you to-day to buy me medium grade of wool and to retain $6,000 as margins.

"You will, of course, buy as much wool on the amount of margins as possible. Judging from the price of that quality or grade of wool, think you can afford to purchase some 30,000 lbs. on $6,000 margin, and should more margins be required will put it up. Send bill of purchase. Buy as good and saleable an article as possible of that grade.

"Truly yours,

G. H. AYLESWORTH."

The evidence likewise tended to show that this letter was not received by Parker, Culton & Sprague, until the 22d of August, and that before the receipt of it, Mr. Culton, of that house, having failed to complete any purchase at Chicago, (although he had examined several lots there and had at one time nearly completed a purchase,) had gone to Charleston, Ill., to look at a lot of wool, which he bought while there to fulfil the telegraphic order. No steps were taken, the bill of exception states, to communicate the contents of this letter to Mr. Culton; but it is shown that he purchased the wool before noon of the day the letter was received at Chicago, and it is not shown that the letter was received there before noon of that day. The Court, too, instructed the jury, that if the wool was bought at Charleston, before the partner who made the purchase could be informed of the contents of the letter, the letter would not bind plaintiffs; otherwise it would.

Before the purchase of the wool at Charleston was made, several letters were written from the house of Parker, Culton & Sprague, to George H. Aylesworth, concerning a trade for wool, which had been previously on foot, but subsequently fell through, and which are recited at length in the transcript. How these letters came to be written, is to some extent disclosed by a question addressed to Mr. Parker at the trial, and his answer thereto, which will be found on the 6th page of the printed record.

The wool, it appears by the record, was sold, in Boston, under directions from the plaintiff in error, and failed to sell for the amount of the advances made by Parker, Culton & Sprague. It was bought by them for George H. Aylesworth, "in the summer and fall of 1864, during the war of the great rebellion," when the demand for wool for army clothing was very great, when the market at Chicago for medium wool was active and excited, and when consequently the grading was not so close and the examination of it by buyers and commission merchants was not so critical and exact as before or after the war. It was sold in April, 1865, after the capture of Lee, when the demand for army clothing had entirely ceased,

and when the collapse of the wool market had made the grading and inspection more rigorous, perhaps, than it had ever before been known to be.

The bill of exceptions does not profess to set out all the evidence given in the cause. We know, indeed, that it would be improper that it should. Nor does it even profess to set forth an abstract thereof. Yet the learned counsel for the plaintiff in error argue as if the Court would adopt the meager extracts given as though they contained the whole of the evidence. We suppose, however, that this Court will support the instructions of the Circuit Court, if they would be correct, if applied to any state of facts which might have been given in evidence, unless it is affirmatively shown that there was no evidence of such facts.

We will now proceed to notice the alleged errors for which the plaintiff in error insists the judgment ought to be reversed.

1. The first is, that Mr. Culton (one of the plaintiffs) was allowed, while testifying as to the examination of the wool made by him at Charleston, to state that while making such examination, one Clement, from whom he purchased it, said, "that he, (Culton,) was very particular, and that the other bales of wool were just like those examined." Exception is not separately reserved to the statement that "he, (Culton), was very particular," but to the whole of Clement's statement. If the remainder of the statement, therefore, was admissible, the objection must fail, even though the statement that "he (Culton), was very particular," (which would seem quite harmless) might have been erroneously admitted. 4 Wall. 680; 7 *id.* 132; 3 How. 515; 13 Pet. 302; 1 Pet. 337. Now that the proof of what Clements told Mr. Culton, concerning the bales of wool not examined, after he had examined 15 to 22 bales, was admissible as conducing to show Mr. Culton's good faith, we do not think there can be any doubt. A factor being bound to exercise good faith towards his employer, whatever conduces to show that good faith was practiced, is admissible.

This was not hearsay evidence as counsel erroneously assume. It was not received to show that the remaining bales were in fact like those which Mr. Culton had examined. The plaintiff in error did not except to the evidence recited, that Mr. Culton, after examining "15 to 22 bales, decided *upon the information of others*, as well as upon such examination, that all had been clipped from two flocks of sheep;" yet this statement of Clement's was no more hearsay than such information.

2. The next objection is to evidence given of the report made by Mr. Culton to his partners as to the result of his endeavors in Chicago while striving to fill the order of G. H. Aylesworth for wool. See the eleventh page of the printed record. The admission of the evidence was excepted to on the ground that statements and conversations of the plaintiffs among themselves, were not competent evidence in the cause. Counsel assume that the evidence was offered "as a sample of proof of diligence." But it is manifest that it was offered as part of the *res gestæ* on the occasion of the first negotiations for the purchase of wool, particularly as expla-

natory of the circumstances under which the letters to G. H. Aylesworth were written relating to the negotiation which failed; and for that purpose it seems to us to have been clearly admissible.

3. The next objection is to the admission of evidence tending to prove that "in the summer and fall of 1864, and during the war of the great rebellion, the Chicago market for wool was active and excited in consequence of the demand for wool for army purposes and that consequently the grading of wool in the Chicago market was not so close, and the examination of it by buyers and commission merchants not so exact during that period as before and since." The evidence was admitted, as the record discloses, on the ground that it was competent on the point whether the factors exercised due care in purchasing the wool.

The evidence in the record does not show what a medium grade of wool is; nor that there is any definite standard for determining it; nor that what is a medium wool at one time or place, may not be different at another time or place; nor that Chicago was not the contemplated market for the sale as well as for the purchase of wool. Indeed what is in the record rather indicates that it was. This Court, in the absence of evidence, would not undertake judicially to determine these questions. This evidence conduced to show what was medium wool in the Chicago market at the time the factors were directed to purchase wool, and that the grade was not as sharply defined as it had been before the war. There is, too, nothing in the record tending to show that a less strict standard did not prevail in all the other wool markets.

The Court did not, as counsel argue, instruct the jury that an entirely different grade of wool from what was ordered could, if allowed by usage, be selected in fulfilment of the order; it merely allowed proof of a usage to determine what was a medium grade of wool in the Chicago market at the time the order to the factors was given.

4. The Circuit Court also admitted evidence of experts tending to show that "the usage by commission merchants in Chicago during the excited market in 1864, and during the war of the great rebellion, was, as a matter of care and diligence, to examine 8 to 10, (as stated by some witness,) 12 to 15, (as stated by others), and 15 to 20, (as stated by others), bales of wool out of 100 bales to determine the grade and condition of the entire lot of 100 bales in filling orders of the kind given in this case, and that such examination would amount to *reasonable care* in filling such orders in Chicago, according to the usage of commission merchants in that city during that time."

This evidence was admitted to show the degree of care and diligence which the factors were required to exercise in selecting the wool in question. They had, as the evidence tended to show, exercised as high a degree of care—indeed a higher one—than by usage in the Chicago market was customary with persons in the same business. Parsons, in his work on Contracts, says, "Factors or brokers must conform to the usages of the business and have the power such usages would give them." In Sutton *v.*

Tatham, 10 Adolph. & Ellis, Littledale, J., says: "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." And in the same case, Lord Denman, C. J., remarked, "I think a person who employs one who is notoriously a broker, must be taken to authorize his acting in obedience to the rules of the Stock Exchange."

In Bayliffe *v.* Butterworth, 1 Exchequer, 425, the defendant, who resided some distance from Liverpool, authorized the plaintiff, a broker there, to sell for him twenty railway scrip shares. The plaintiff sold them to C., another broker at Liverpool. The scrip shares were not delivered on the day, and C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price. The plaintiff paid him the difference and brought an action for money paid to recover this sum. It was proved to be the usage amongst brokers at Liverpool to be responsible to each other upon these contracts. There was evidence tending to show that the defendant was cognizant of the usage. The defendant was held liable, and Parke, B., and Rolfe, B., expressed the opinion that the defendant's knowledge of the usage was immaterial.

In Pollock *v.* Stables, 12 Q. B., 765, the points held were that, if a party authorized a broker to buy shares for him in a particular market, where the usage is that, when a purchaser does not pay for his shares within a given time the vendor, giving the purchaser notice, may resell, and charge him the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, might sue his principal for money paid to his use, and that it was not necessary, in such action, to show that the principal knew of the custom.

And, in a very late case, Ireland *v.* Livingston, 2 Law Rep., (Q. B.) 99, the doctrine of these cases is affirmed. The defendants in London, wrote to the plaintiffs, commission agents at the Mauritius, that should the beet crop prove less than usual, there might be a good chance of something being made by importing cane sugar, and that they might ship 500 tons, &c. So large a quantity of sugar as 500 tons could not be purchased in one lot at the Mauritius, and it was the customary course of business there, in carrying out an order for a large quantity of sugar to purchase it in smaller quantities, from time to time, of different persons. The plaintiffs purchased 400 tons, when prices rose, and before the order could be completed the defendant countermanded it. Shee, J., said: "No doubt the order was to purchase 500 tons, but it was an order given to the plaintiffs to act as his agents at the Mauritius in the purchase of sugar, and every one who employs an agent to purchase goods for him at a particular market *must be supposed to be dealing with regard to the usages of that market;* as laid down by Alderson, B., in Bayliffe *v.* Butterworth, 1 Exch., 429: 'A person who deals in a particular market must be taken to deal according to the custom of that market, and *he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place.*' Now, according to the usage of the Mauritius market it was impossible for the plaintiffs to buy the sugar in one lump. * * * What was bought was bought on account of the defendant, and the usage of the market being admitted

in these pleadings, the defendant ought to receive the sugar and pay for it."

In Goodenow *v.* Taylor, 7 Mass. 36, where a factor sold the goods of the principal on credit, the Court say: "The usage of the market where the goods are sold would bind the owner, for he is presumed to be cognizant of that usage; and if he is silent in his directions to his factor as to the terms of sale, he is considered as intending to be governed by that usage."

In Potter *v.* Morland, 3 Cush. 384, where goods were consigned to a factor for sale with general instructions to remit the proceeds, it was held to have been sufficient if the agent remitted by a bill of exchange, without indorsing or guaranteeing it, provided that such was the usage at the agent's place of business.

And in this Court it has been held, where a note was made payable or negotiable at a bank whose usage it was to demand payment on the fourth day of grace, that the parties were bound by that usage, being presumed to agree to be bound by it, though they did not in fact know it. 11 Wheat. 431.

Aylesworth had instructed the defendants in error, to buy "medium wool." What was medium wool, and what care they were required to exercise in the selection of it in order to secure the proper grade and quality, was, as these authorities show, to be determined by the usage of persons engaged in the same branch of business in which the defendants in error were employed. If their principal desired them to do something more than by usage they were accustomed to do, it was his duty to give them specific instructions to that effect.

It was not incumbent upon these factors to show that Aylesworth in fact knew of these usages of the Chicago market. It was his duty to have informed himself of those usages. The factors might well presume, as matter of law, that he was familiar with them. It is hardly conceivable that in fact he was not. He lived conveniently near to Chicago. He had been previously engaged in dealings there, as was evinced by the moneys of his in the hands of Parker, Culton & Sprague, at the time the order for the purchase of wool was given. He was speculating in that market as is shown plainly enough by the correspondence. Objection was not made to the evidence upon the ground that it was not accompanied by evidence tending to show that Aylesworth was cognizant of the usages of that market, and for aught that appears, the evidence may have been abundant to show that he was.

Counsel for the plaintiff in error discuss at great length the requisites of a custom, following the enumeration of Blackstone in his Commentaries. We need not make a lengthened reply. The Courts have themselves distinguished between mercantile usages and customs. The exigencies of commerce require that trade shall not be fettered by so numerous and arbitrary rules. In respect of immemorial duration, the first and chief of those rules, counsel concede that it does not apply to a mercantile usage. Lord Mansfield once said: "It is no matter if the usage has only been for a year." Noble *v.* Kenoway, Doug. 610.

The evidence admitted related to a usage which had prevailed continuously among commission merchants at Chicago from the beginning of the rebellion to the time of the purchase of the wool—more than 3¼ years—and which had been 'peaceable and acquiesced in' among them. Why the

usage arose, it was not competent to prove; but it is not difficult to suppose that in the excited market which prevailed at Chicago during the war, when the demand for army clothing was so great that it was nearly impossible to supply it, and wool rose to an almost fabulous price; when the competition was among buyers to purchase rather than among producers to sell; a commission merchant who would have insisted, before effecting a purchase for his principal, on taking down and opening each sack of wool and examining each fleece to determine, with exquisite nicety, the exact grade and quality of each particular fleece, would have met with a poor reception among sellers. Aylesworth *dispatched* to his factors to buy the wool, which imported that he desired prompt service, and that the factors should *buy* and not make merely a feint of doing it.

Objection is made to the admission of the evidence of usage, because some witness stated that it was the practice of factors at Chicago to examine 8 to 10 bales, others 12 to 15, others 15 to 20 bales of wool out of a lot of 100 bales. But could the Court say the evidence should not be *admitted* because the witnesses, as they testified, did not all agree? If it was competent to prove a usage at all, it was competent to hear the witnesses, if they said there was a usage, however they might differ from each other respecting what the usage was. Whether their evidence would prove a usage, was a question for the jury.

We shall now proceed briefly to review the instructions given and refused, to which exceptions were reserved, and which are discussed in the printed argument for the plaintiffs in error.

The first (brief, p. 15; printed record, p. 13), is an instruction asked and refused, viz:

"It must appear from the evidence that the purchase the plaintiffs claim to have made, was in fact made substantially in accordance with the instructions given for that purpose by *defendant* and G. H. Aylesworth."

As no instructions had been given by the *defendant* relating to the purchase, which had been made long before he had anything to do with the wool, the instruction thus asked was, of course, properly refused. It was not pertinent to the evidence.

But the Court did instruct the jury that—

"Commission merchants to whom orders are given to purchase goods of a particular quality or description for their principals, if they undertake to fulfill such orders, are bound to do so in good faith, and with proper skill, care and diligence, and if they omit so to do, they are liable to their employers for the consequences of the want of such good faith, skill, care and diligence, but they are not to be held responsible as insurers, or guarantors. And if, having exercised such good faith, skill, care and diligence, a mistake (occurs) as to the *quality*, or *condition* of the goods so purchased for his principal, the commission merchant is not in such case responsible."

And the Court, by request of Counsel of the plaintiff in error, further charged that—

"The legal construction of the telegram is, that the plaintiffs were to buy in the Chicago market as much wool of *medium grade*, in *good merchantable condition*, as the $6,000 they were authorized to retain as margins would enable them to purchase; and then to hold such wool subject to the order of Aylesworth. If the plaintiffs assumed to act upon this telegram, it was their duty to fill the order given, and to that end, they were

bound to bring to the performance of that duty, *sufficient skill and diligence*, to *select the article ordered*, and the purchase by them of wool of any other grade, or condition, would not bind Aylesworth, unless, with a full knowledge of the *grade* and *condition* of the article they had obtained, he should afterwards ratify and assent to what they had done." But the learned judge added that "if the plaintiffs, in purchasing the wool, exercised due skill and care, they were not responsible though they did not fill the order."

The jury were further instructed in substance that in filling the order for wool the defendants in error must have exercised the utmost good faith toward their principal, and used such reasonable skill, care and diligence in selecting the wool as was customary at that time among commission merchants at Chicago.

It seems to us that the rule in relation to the duty of the defendants in error in selecting the wool, was here stated as strongly in favor of the plaintiff in error as the law would allow. They must have exercised the utmost good faith; they must have possessed skill sufficient to select wool of the grade and quality ordered; they must have exercised such skill, by doing all, in respect of such selection, which commission merchants, at the market of selection, in conformity to a usage which had existed there during the whole period of the war, were required to do.

The objection urged to these instructions is, that they did not state that the factors were required inexorably to select and purchase precisely such wool, in respect both of grade and quality, as was ordered. It is really insisted that not only were they bound to exercise the utmost good faith, but also such supreme skill and diligence that no opportunity for accident or mistake could intervene. No usage of the market could be regarded; no care, "reasonable," but not supreme, would suffice. No authorities are cited in support of such an extraordinary position, and it may fairly be assumed that none can be. Certainly no plausible argument could be presented against these instructions, unless in respect to the clause relating to usage, and it seems to us that the cases which we have cited, in another part of this argument, fully support that clause.

The rule applicable to agents is succinctly stated in Story on Agency, as follows:

"The agent is understood to contract for reasonable skill and ordinary diligence, and he is consequently liable for injuries to his employer occasioned by the want of reasonable skill, and also for ordinary negligence. By reasonable skill we are to understand such as is, and no more than is, ordinarily possessed and employed by persons of common capacity, engaged in the same trade, business or employment. By ordinary diligence we are to understand that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs." Story on Agency, § 183.

But counsel profess to have found an "express warranty," in certain letters of the factors, that the wool met the requirements of G. H. Aylesworth's order. These are letters written after the purchase, in which they speak of the wool as "a choice lot," and as being "all right." If they had, in purchasing, exercised the care and diligence required of factors, their duty was discharged, and commendations of the wool, though m staken ones, could not, of course, involve them in liability to their principal.

These expressions were merely expressions of opinion. But if, after the purchase was made and their duty discharged, they had "warranted" the article, would not a new consideration be necessary to support the warranty?

We have heretofore referred to the fact that the wool was purchased by Mr. Culton on the telegraphic order of George H. Aylesworth, and before he knew anything of the letter written by the latter person. The Court, after instructing the jury that "the telegram only required the plaintiffs to purchase a fair saleable article of medium wool, while the letter ordered as good and saleable an article as possible, and that otherwise they were the same," added, that "if the wool was bought at Charleston before the partner who made the purchase could be informed of the contents of the letter, the letter would not bind the plaintiffs; otherwise it would."

We do not think (in view of the other instructions given) that it is of much consequence, so far as respects the care and diligence exercised by the factors, whether they were governed in purchasing the wool by the dispatch or by the letter. But it is argued that if it was bought at Charleston in conformity to the dispatch, (which contained no hint of further instructions by letter,) and when it reached Chicago, the letter had been received, it must have met the requirements of the letter, if they were more exacting. This objection is made, notwithstanding the plaintiff in error had asked the Court to charge as follows:

By the terms of the *telegram*, plaintiffs were to purchase the wool in the Chicago market, but they were not precluded from making the purchase elsewhere and bringing the article to Chicago; and as it appears from the evidence that the wool the plaintiffs claim to have purchased for Aylesworth was, in fact, purchased at Charleston, Illinois, some 100 miles distant from Chicago, the plaintiffs in making the purchase at another place assumed all the risks of bringing it into Chicago; and that, when brought there, it should fill the *order* of Aylesworth both as to grade and condition, and if it failed to do so, then Aylesworth was not bound by the purchase.

We submit that this instruction assumed that a compliance with the telegraphic order was sufficient. There was no hint about any other. The Court gave it with a qualification not important to the question under discussion. An objection now that the Court ought to have instructed the jury that when the wool arrived at Chicago, it must, to fill the order, have complied with the requirements of the letter, we submit, (without intending to reflect upon counsel,) is not admissible.

But even if the objection were admissible, we think that this Court will not hesitate to hold that under an order to a Chicago commission merchant to purchase wool, he may well purchase at a railroad point within 100 miles of that city, and that, if he has complied with that order, he shall not be undone by the arrival of another order before the wool has reached the city, containing different conditions.

The last instruction given by the learned judge to which counsel for the plaintiffs in error object, was to the effect that if the jury should find that without fault of the plaintiffs the wool in transit to Boston got so mingled or confused with other wool, that its identity was lost, the plaintiffs [the factors] would not be responsible for the consequences if the defendant assented to or ordered the shipment to Boston.

The objection to this instruction is based upon the assertion that Aylesworth only *consented* to the shipment, upon the factors' urgent solicitations, and that the factors selected their own agents, &c. Let us see how far this assertion is founded in fact.

On the 18th of January, 1865, Aylesworth, in his letter, "presumes" that Parker, Culton & Sprague have correspondents in New York and Boston, and thereupon proceeds to ask them, whether it would be better to ship the wool to one of those places, than to sell in Chicago. On the 20th of January P., C. & S. reply that they "know of no better advice" to give Aylesworth, than to ship to Boston, and ask his directions and hope he may conclude to send it. On the 30th of January, he directs them to "ship it as soon as they can." Printed rec., pp. 16, 17.

Aylesworth having thus directed the shipment of the wool to Chicago, we think that the instruction was so plainly correct that no argument is needed to support it.

Objection is urged (brief, p. 26,) to an answer given by the learned judge, in the course of the trial, to a question addressed to him by a juror, and the objection is argued at length, but it will be observed that no exception was reserved. Printed rec., p. 18.

The Pork Transaction.

The evidence and instruction relating to the Pork will be found on the 18th and 19th pages of the printed record. Aylesworth, it will be seen, negotiated a sale of the pork while it was in the hands of his factors, and while they had a lien on it for $3,512 25, advanced on the purchase of it, and for their commissions and expenses. The purchaser did not offer to repay the advances, &c., thus made, and they refused to transfer to him the pork until they were paid. The only question presented is, whether they were required by law to part with possession of the pork until their advances, commissions, &c., were first paid or tendered. The Court charged that they were not. It seems to us that there can be no doubt that the Court charged correctly. The Frances, 8 Cranch, 418; Brown *v.* McGran, 14 Pet., 479. 1 Pars. Cont. (5th ed.) 98.

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